

EMERGENCY POWERS IN THE NEWLY
INDEPENDENT AFRICAN ~~STATES WITHIN~~ *COUNTRIES IN*
THE COMMONWEALTH.

A Thesis presented for the Degree of
Doctor of Philosophy of the
University of London.

by

JADESOLA OLAYINKA AKANDE

UNIVERSITY COLLEGE, LONDON.

1971



BEST COPY AVAILABLE.

VARIABLE PRINT QUALITY

ACKNOWLEDGMENT

I should like to express my special gratitude to Professor D.C. Holland, the Dean of Students, of the Faculty of Laws, University College, London, for his untiring assistance in the supervision of this work. I am also very grateful to the innumerable helpful officials of the various embassies and members of staff of the various law faculties and libraries whom I met during the course of my field work, particularly, Dr. M. I. Jegede of the Faculty of Law, University of Lagos, for his many useful suggestions. My thanks also goes to the Director of the Ford Foundation for the financial assistance towards the cost of undertaking this study. Last, but by no means least, my loving gratitude goes to my husband, Debo Akande, without whose encouragement, understanding and unfailing support, I could not have embarked on this work.

C O N T E N T S .

Table of Law Reports and Abbreviations

Table of Cases.....	II - III
Table of Statutes	IV - VI
Journals.	VII
Bibliography	VIII - XIII
Introduction	3 - 10
Chapter One Historical Prospective	11 - 42
Chapter Two Types of Emergency Legislation	43 - 81
Chapter Three ... Use of Emergency Powers	82 -176
Chapter Four Emergency Powers and Citizens' Rights	177 -220
Chapter Five The Judiciary and Emergency Powers	221 -294
Chapter Six Checks on Exercise of Emergency Powers	295 -320
Chapter Seven ... Military Take-Overs	321 -372
Chapter Eight Conclusion	373 -397

ABSTRACT

The subject has been studied under eight chapters. In a very brief introductory chapter an attempt has been made to delimit the scope of the subject-matter. As the title suggests not all the newly-independent countries within the Commonwealth have been discussed but an attempt has been made to bring in at least one country from each part of the four corners of the Continent. The study has been limited to the newly-independent countries mainly because of their relative political and constitutional instability following the attainment of independent status, with the result that quite often emergency powers have had to be invoked to restore a measure of stability.

It is believed that a subject is better appreciated by an understanding of its history, hence the first chapter deals with the historical development of emergency powers. All Commonwealth countries in Africa had at one time or another been under the colonial control of Great Britain and the colonial administrators had found it necessary to provide for and use emergency powers to deal with a number of situations. There is no doubt that the emergency powers in the new nations are part of their colonial heritage.

The various types of emergency legislation which are found in the countries within the area of study are discussed in chapter Two in such a way as to bring out the scope and content

of the powers which they confer on the executive during a period of emergency. Chapter Three deals with the practical operation of these powers and the situations which had led to their use. Some of the illustrations bring out clearly the dangers inherent in the use of such wide discretionary powers. The Fourth Chapter deals with the effect of emergency powers on citizens' rights. A declaration of an emergency invariably leads to the suspension or denial of some vital rights of the citizens. The next chapter (Chapter V) deals with the role of the judiciary during emergency periods and to what extent they have been able to stand against the possible excesses of the Executive in operating emergency powers, as well as the danger and extent of possible involvements of members of the bench. In the chapter which follows, broad aspect of checks on the exercise of emergency powers is discussed. The point is whether the various types of checks or safeguards both constitutional and institutional are sufficiently effective in preventing the encroachment of totalitarianism.

Chapter Seven discusses the effect of military intervention in politics and to what extent they are able to cope with the various problems of government, even by use of emergency powers.

The last chapter, as well as giving a brief summary of the general trend of the discussion in preceeding chapters, indicates the reasons why the present writer believes that the present prevalent reliance on emergency powers by the governments of the

new nations is merely one of the growing pains which must lessen and eventually disappear as the new nations mature.

INTRODUCTION

The expression "Emergency Powers" connotes the powers, over and above those recognised as existing when the ship of state is proceeding on an even keel in fair weather, available to a government in times of crisis. Formerly 'crisis' in this connection was generally assumed to be limited to war, insurrection and riots, but as the conception of the duties of the state has been enlarged, and as the technique of the revolutionary has improved, the concept of 'crisis' has been enlarged to include any serious threat to the safety of the state and its social and economic stability, so that it is no longer unusual to find constitutions which confer emergency powers on the government to deal with dangerous or difficult situations in peace-time. Thus, for instance, the British Emergency Powers Act, 1920, was intended to meet threats to essential public services and was brought into operation during the coal strike of 1921, another sectional strike of 1924, the general strike of 1926 and the dock strike of 1948. The British Supplies and Services (Transitional Powers) Act, 1945, sought to provide the government with extra-ordinary powers to deal with the transition from a nation in arms fighting for its existence to the peace-time welfare state after World War II. New powers were again conferred upon the govt. to

meet an economic crisis by the Supplies and Services (Essential Powers) Act, 1947 which gave carte blanche to the government to ensure that "the whole resources of the community are available for use and are used in a manner best calculated to serve the interests of the community." It is clear from all this that the meaning of 'crisis' or 'emergency' in the present context has been extended to cover any situation deemed dangerous to the welfare of the public.

There has been a corresponding change in the nature of emergency powers. Whereas formerly they consisted mainly in enhanced powers to employ force, they now include powers to legislate by executive decree, to curtail basic freedoms, to conscript wealth and talents of the people and in federal states, the concentration of powers of regional governments at the centre.

In the following pages, it is proposed to attempt a study of emergency powers in some of the newly-independent states of Africa within the Commonwealth; the nature of the legislation conferring these powers, the circumstances in which they have been invoked and may be invoked and the control over the authorities who exercise such powers. It is also proposed to deal with the tendencies envisaged by the exercise of these powers in the administration of law and order with a view to finding out whether the democratic principle is in danger of subversion in a democratic state during a period of emergency and whether any safeguards

against the possible encroachment of totalitarianism could be adopted without seriously interfering with the exercise of such powers when circumstances demand such exercise.

As all the legal systems of these States in Africa are, in varying degrees, based on the common law, it will be helpful to an appreciation of the subject to make some occasional comparisons with the law of emergency in other common law countries.

If emergency powers prove a threat to civil liberties in countries of which democracy is a well-established product, they cannot be innocuous in states where democracy in its modern connotation as accepted in the Western world, is not yet fully acclamatized and where public opinion is neither sufficiently educated nor developed to withstand incursions into human rights. "For if they do these things in a green tree, what shall be done in the dry."¹

It has been said that "in the eternal dispute between government and liberty, crisis means more government and less liberty."² One is at times confronted with the vision of a dictator, in the name of emergency, attempting the role of a universal Providence, as happened in Ghana to some extent under the Nkrumah Regime, and the Chief Justice of a Supreme Court straining all his intellectual

1. St. Luke, Chapter XXIII, verse 31.

2. C.T. Carr, Concerning English Administrative Law, p. 92.

nerves to justify the role. "If bad cases make bad law, emergencies may make even worse."¹ Hence the importance of a study of emergency powers in Africa where democracy under the stress of emergency real or otherwise, tends to be controlled or guided, and in the long run, probably subverted. The course of democracy, like that of true love, has never run smooth: that its course is more winding and rougher in most of the newly-independent African states at the present time is undoubted, but that the situation will improve in due course and the reasons for such optimism will be the topic of the conclusion of this study.

Within the last decade, there have come into existence thirty-eight independent states in Africa. Of these, eleven are English speaking, that is, they were former dependencies of Great Britain.² At Independence, each of these countries freely opted to remain within the Commonwealth. Therefore, they are all literally within the definition of "newly-independent African states within the Commonwealth," but both time and space make it impossible to deal with each and everyone of these states in this study. An attempt has, however, been made to include in the choice of countries at least one from each part of Africa. Besides, in spite of the divergencies of historical development and of cultural patterns among the eleven independent members of the Commonwealth in Africa,

1. Ibid. p. 65.

2. Ghana, Nigeria, Sierra-Leone, Gambia, Kenya, Uganda, Tanzania, Malawi, Zambia, Botswana and Lesotho.

certain common features are noticeable, particularly in respect of the subject-matter of this study. This similarly can be traced back to the fact that during the days of colonial rule, the colonial administrators responsible for the general policy in administering the dependencies of Britain in Africa believed that what was good for the goose was also good for the gander. Firm adherence to such a believe, of-course, saved a lot of energy and time of finding out what might be more preferable for the good of the 'gander'.

The threat of elements within a nation sufficiently strong to disrupt the life of a country and jeopardise the existence of the prevailing form of government is a problem of accelerating importance in a modern world and even more so in the newly-independent African states. In many of these States constitutional sanction has been found for meeting the threat of such subversion by the most stringent measures. In defence of the use of these measures, some leading African statements have expressed the belief that it is sometimes necessary to suspend constitutional safeguard in order to preserve the security of the State." A legal system can be the refuge of private power as well as the avenging arm of government interference. It is a question of probable dangers and more African governments face

the danger of government weakness than of government strength."¹
The problem is how to reconcile the democratic idea of the freedom of the subject with the need for the preservation of the state and there is real difficulty in discovering when and where to draw the line that divides the individual's legitimate interests from those of the state. A totalitarian government may handle the situation without embarrassment but the apparent necessities evoked by danger often conflict gravely with the postulates of constitutional democracy.

Political philosophy has set the modern state the task of resolving this conflict. Hence it is becoming more accepted that internal disturbance may justify the proclamation of a state of public emergency and the promotion of measures which might seriously derogate from the fundamental liberties of the subject. But there is some doubt as to the extent to which highly restrictive or emergency measures may legitimately be taken to repress incipient revolt or resentment that is animated by sentiments of separate group identities, particularly in the new nations of Africa where there is the all too frequent phenomenon of sectional self-assertiveness among the polyethnic communities. The need for Government security might,

1. per President Kaunda of Zambia, leading article in the "Newstateman" (London) of 25/7/69.

if pursued in too single-minded a manner, lead to a situation where personal liberty could be overlooked or even jettisoned.

While emergency does not create power, it may furnish the occasion for the exercise of power. The constitutional question presented in the light of an emergency is whether the power possessed embraces the particular exercise of it in response to particular conditions. The government can move against those who take arms against it whether nationally or internationally and whether literally or figuratively. The constituted authority has the right of self-preservation. Those who run the state have onerous responsibilities and private rights may have to be subordinated to the public good.

The central purpose of the legislature is in respect of state security and it necessarily provides all the means of establishing all the legal machinery and legal provisions considered necessary and appropriate for the purpose. The responsibility for the practical measures taken in order to protect the country must, therefore, belong to the Executive. The prosecution of a war or the suppression of subversion is of necessity an executive function and has always been so conceived, hence under the delegated power and sometimes by direct enactment, the very widest discretions are vested in the Executive. What

the power will enable the Executive to do at any given time depends upon what the exigencies of the time may be considered to call for or to warrant. The meaning of the power may, of-course, be fixed as it usually is, but as according to that meaning, the fulfilment of the object of the power must depend on the ever changing course of events, and the practical application of the power will vary accordingly.

The fact remains that Governments do equip themselves with emergency powers in readiness to meet any emergency, however it may arise, and there is no doubt, as will be shown in the following pages that emergency power when wielded can extend to every matter and activity so related to the emergency as substantially to affect every aspect of life within the state.

CHAPTER ONE
HISTORICAL PERSPECTIVE

One of the first overseas regions to be discovered by Europeans, tropical Africa, was one of the last to be controlled by them. It was long thought of less as an asset than an obstacle, since it stood in the path of every India-bound mariner, and it was to India and "the Indies" that most sixteenth-century mariners were bound. If it could be got around without the necessity of providing numerous ports of call - as indeed it could be once the Portuguese discovered how to turn wind and current to their advantage - so much the better. Though the demand of the Americas for the African slaves later took many Europeans to the West coast of Africa, few settlements were founded other than forts where attacks from hostile tribes could be repelled, slaves rounded up, ships repaired and revictualled, and sick mariners given a change to convalesce. Even as late as the eighteenth century there was little thought in anyone's mind of establishing a reign of law over the raided hinter-lands. As for the East coast, once the excitement of the Great Discoveries was over, the Europeans lost interest in it. They found that the Arabs had for centuries been doing a steady business in East African slaves and ivory and were in no mood to hand it over. It was not till the early nineteenth century that European Governments began to take a close interest in Tropical Africa.

Slavery and slave trade, at long last, were coming to be seen for the evil things they were, and Christian nations on both side of the Atlantic were willing to join forces in excising them from their social systems. As far as West Africa was concerned, the task presented no very serious difficulties. The sea-borne slave traffic could be and was suppressed by naval action, from reasonably accessible Atlantic bases. In East Africa the matter was different. The Arabs did not share the moral scruples of the Christians concerning the slave trade, and saw no reason for denying themselves the handsome profits to be derived from it. Nor were the slave-running dhows much troubled by the naval patrols, sent to intercept them; the short sea passage between the major east coast slave ports and those of Arabia made interception much more difficult than it proved to be on the Atlantic slave run. The only way to destroy this trade, it was soon agreed, was to discover its source of supply. It was the search for these, more than anything else probably, that underlay the explorations of the tropical interior of Africa in the middle and late nineteenth century. From these explorations came, first, the realisation that, with local exceptions, the native people were living outside the broad stream of human progress; and, second, the

belief that, given stable and humane governments, the greater part of their territory could be developed to the mutual profit of both the developed and the developer. To the Christian churches, the realisation was a call to missionary enterprise. Scarcely had the explorers returned before the missions were claiming the kingdoms of Africa for God and His Christ. Indeed, some of the early missionaries were as much explorers as preachers, teachers and doctors.

Before long, nationals of every leading state in Europe were running loose in land that was still largely unmapped and, on that account, was often supposed to be no man's land. One thing was soon agreed upon: whether it was a matter of developing natural resources or evangelizing people, some form of government sponsorship, or at least government protection, was needed. Although few of the European governments were eager to give such sponsorship or protection, they were reluctant to see others provide it and thereby acquire perhaps important new national advantages.

And so the whole region of tropical Africa, with the exception of the already sovereign Liberia and Ethiopia, came to be staked out among the major European powers. The period of the partitioning took less than forty-years. The results were often

as unhappy for the governed as they were unflattering for the governors. While lofty humanitarian principles were voiced in the council chambers and on the lecture platforms of Europe, the practices adopted by the men were frequently neither lofty nor very humane. "Whoever has handled the treaties to which ignorant chieftains affixed their wavering X's as symbols of their acceptance of the white man's rule cannot escape the conviction that varying degrees of deception must have been employed to persuade Africans into signing papers which they could hardly understand."¹

The task of 'humanizing' the society of tropical Africa and raising its low levels of production and consumption was found to exceed the financial resources of most of the colonial powers. Almost without exception, the cost of running African colonies proved greater than the revenues derived from them. In the circumstances the colonizing powers were generally only too willing to leave the initiative in economic matters to such private companies and individuals as were able to put up the necessary capital and find the necessary manpower. In some instances, they left the initiative in political affairs as well to private companies and individuals. Also, they were often willing to condone treatment of the African that was out of

1. H. R. Rudin, "Africa in Perspective" Journal of International Affairs, Vol. VII (1953), No. 2, p. 121.

harmony with their protestations of concern for his life and liberty. Some of the methods used to recruit labour and keep it differed from those of the slave driver in nothing but name, and resistance to them by the conscript not infrequently led to counter measures of the most brutal sort.

The Establishment of British Rule

A. Central and East Africa

It is over one hundred years that David Livingstone by his historic journey across Africa, drew the attention of the Western world to the state of the Central African peoples. Fired by his achievement, explorers from Britain and other European countries made their way into the interior of the countries now called Uganda, Kenya, Tanzania, Zambia and Malawi. With them and after them went missionaries, traders and administrators.

The peoples they found were menaced by famine and the prey of inter-tribal warfare. Over them all was the shadow of the slave traffic. The slavers, Arabs based on Zanzibar, were active throughout all the country of the Great Lakes and steadily expanding their operations southwards into Central Africa.

The British Government made repeated representations against the traffic to the Sultan of Zanzibar, who at that time claimed dominion over the whole of the East African territories; but beyond that the Government was not prepared to go. The German

Government, however, supported its nationals more directly, and in 1885, following the conclusion of a number of treaties with local chiefs, they declared a Protectorate over a large part of the Sultan of Zanzibar's mainland territories in what is now Tanganyika. This raised the whole question of the extent of the Sultan's domains and in 1886, his assent was obtained to an agreement whereby his authority was limited to islands of Zanzibar, Pemba and Mafia, together with a ten-mile wide strip along the coast. The inland territories were divided into British and German spheres of influence, and an Anglo-German treaty of 1890 extended this division westward to give Britain special rights in Uganda. In the same year Zanzibar was declared a British Protectorate.

In 1887, the Imperial British East Africa Company began to operate in East Africa and was granted a charter in the following year, the Sultan having awarded them a concession of the mainland between the rivers Tana and Umba. The Company's activities were, however, the reverse of profitable and in 1893 they determined to withdraw from Uganda: but their administrator there, Captain F. D. (later Lord) Lugard, held this to be a breach of faith with the Africans with whom agreements had been made: and, largely as a result of his energetic representations at home, the British Government assumed the responsibilities laid down by the Company and declared a Protectorate over Buganda in 1894,

extending it two years later to Bunyoro and other outlying portions of the British sphere of influence. A Protectorate over the eastern part of the company's territories then called the East African Protectorate, was established in 1895.

Further south the course of events were not dissimilar. The missionaries who followed Livingstone to Lake Nyasa in the early eighteen-sixties were quickly forced out by the activities of the slave-traders and the fierce inter-tribal wars with which they had to contend. In 1874 and 1875, however, the Church of Scotland established a mission at Blantyre and the Free Church of Scotland one at Livingstonia and these achieved a powerful influence with the Africans. In 1878 the African Lakes Company was first established at Livingstonia as a trading and transport concern, working very largely on behalf of the mission. Other pioneers followed, missionaries, traders and coffee-planters. In 1883 a consul was accredited to "the kings and chiefs of Central Africa" and settled at Livingstonia, and a second was established at Zomba.

In 1891 an Anglo-Portuguese Convention recognised British administration in the whole of the country adjoining Lake Nyasa. Five years later the slave trade had been extinguished and most of the country pacified. The territory west of Nyasaland was included in the rather vaguely defined region covered by the charter granted in 1889 to the British South Africa Company -

and the boundaries of British influence were still extremely vague.

On the Gold Coast, the Ashanti invasion of the coastal states had interrupted trade and seriously threatened the security of the European forts, none of which were strong enough to withstand an Ashanti attack. Because the Company's forts were proving useless as a means for stopping illegal trading in slaves, its days were numbered. In 1819, the British government sent its own representative, Joseph Dupins, to negotiate directly with Ashanti and then in 1821 it abolished the Company altogether and assumed control of its forts and settlements on the Gambia as well as on the Gold Coast.

With the abolition of slave trade, British merchants in the Niger and Slave Coasts had to turn to 'legitimate' trade. They sought to replace the sale and conveyance of humans with the export of palm oil, ivory and timber.

Side by side with the search by Europeans for trade-routes and for objects of a new and legitimate commerce, there was the beginning of the first really Christian activity in West Africa. Earlier Roman Catholic missionary efforts had only touched West Africa briefly and at one or two scattered points. The beginning of the nineteenth century, however, saw the establishment of flourishing Church of England (Anglican) and Methodist

missions in Sierra Leone. The 1820's saw the coming of missionaries of other denominations and by the 1840s all the main Protestant denominations were represented in the Gold Coast, Dahomey and Western and Eastern Nigeria.

From 1836 - 1849, Britain interfered forcefully along the Niger coast in order to encourage the growth of 'legitimate' trade. With naval assistance, its several agents attempted, by the expedients of treaties and subsidy, to persuade city-states and trading houses to cease dealing in slaves. They also obtained agreements that were designed to ensure British supremacy. In the Gold Coast colony, a committee of merchants in London was given powers of administration, but in 1843 the Crown resumed responsibility. The Colony then consisted only of forts and settlements, but British influence had been increasing for some years and in 1843 a series of Protectorate treaties were negotiated with the Fante and other tribes and provision for the government of the country was made under the British Settlement Act, 1843, and the Foreign Jurisdiction Act, 1843.¹

On a number of occasions, British officials interfered more actively in the affairs of these coastal entrepôts. They removed those indigenous leaders who chose to oppose the growth of Britain's hesitant informal but growing paramountcy. For example,

1. 6 & 7 Vic. cc. 13 & 94.

in 1849, Lord Palmerston sanctioned the removal of Awanta, the high priest of Bonny (Nigeria) after Awanta had aroused Africans against British merchants and property there.¹ Pressed by abolitionist interests in Britain, free traders, and the commercial communities of both England and the Niger Coast, Lord Palmerston finally settled upon a policy of intervention. In 1849, he therefore appointed a consul to the states bordering the Bights of Benin and Biafra. In 1861, as a means ostensibly of bringing about the abolition of the slave trade, the British Government decided to occupy Lagos. By a treaty dated August 6, 1861, King Docemo of Lagos ceded to the Crown the port and island of Lagos with all rights, profits, territory and appurtenances whatsoever thereunto belonging.

For the opening up of trade with the interior, the United Africa Company was formed in 1879 to enable the various British concerns to establish some form of unity and to combat the increasing French penetrations. At the Conference of Berlin in 1885 (which marks the beginning of the "scramble for Africa") the supremacy of British interests on the lower Niger and the British claim to a sphere of influence in Nigeria was internationally recognised. The British Government was slow to undertake any governmental functions, though the Oil Rivers Protectorate was

1. Dike, Trade pp. 88-92.

declared later in the year. Steps were taken to suppress slave raiding in the North, for which the Emirs themselves were largely responsible. A force under Captain (later Lord) Lugard occupied Kano, Sokoto and very soon the whole of the North. The Emirs agreed to the abolition of slave raiding and accepted British protection.

For some years the British Government left its responsibilities largely to the Royal Niger Company, which received a Royal Charter in 1886, and established government services and a constabulary. In 1889 the Charter was revoked and in 1900 the administration of its territory was brought entirely under United Kingdom Government control.

THE MACHINERY OF GOVERNMENT.

A. Crown Colony System:

The British have always believed in being master in their colonial house, thus it was the practice of the British government to control the external relations and policies of each African colony and to assume responsibility for the protection of each colony. Equally, it was its practice to reserve the right to make laws for the colony, to appoint the Governor and to decide the extent of his executive powers and reverse his decision whenever it saw fit.

Quite early in the history of Britain's African colonies provision was made for the Governors of them to receive advice

on the exercise of their powers from legislative bodies known as assemblies or councils. The membership of these bodies was, to begin with, mainly "official", that is, it consisted of men appointed by the Government and, for the most part, government (civil service) men. The "unofficial" minority was made up, largely, if not always entirely, of representatives of special interests or special groups. Initially, African interests were represented by Europeans, usually missionaries; but increasingly they came to be represented by educated Africans. The official members were nominated; the unofficial, either nominated by the Governor or elected.

Over the years, the 'unofficial' membership of these legislative bodies was increased, the basis of its selection broadened, and its role enlarged. Also, the legislative power of these bodies ~~were~~ increased by a continuous process of devolution. However, their power always fell short of that of the British Parliament. This 'standard model' has been characterised thus:

"It may debate and vote on legislative proposals put before it. It may criticize annual estimates. And it may question the government on detailed matters concerning its administration. Criticism from unofficial members may often lead government to modify its original proposals, but it need not do so. The official members have to vote for the government proposals and where they form the majority they can always outvote the unofficial members." ¹

1. Batten, The Community and Development (1951) pp.128-29.

While the legislative council was everywhere "the most conspicuous feature in the progress of the British dependencies towards the stage of Responsible Government",¹ this progress was not without the help of a second legislative institution early introduced by the British into their colonial administration, namely, the Executive Council. For this Council, in Lord Hailey's words, "may be said to have provided the bridge over which the legislative Council passes on its way to gain control of the executive agencies of rule."² In some territories the bridge was built before there was any traffic to use it, that is so say, before the legislative council was set up. Usually the two were set up side by side. The members of the Executive Council, drawn usually from the ranks of the senior government officials, were expected to advise the Governor on problems of administration. As in the case of the Legislative Council, the Governor was under no obligation to accept the advice tendered to him.

At first the "unofficial" as well as the official members of these British colonial legislative bodies were Europeans. In the years following World War II, African representation increased substantially in almost every colonial territory. Then followed the introduction of participation by Africans into the Executive Council, the gradual removal of the official members and the removal of the Governor's reserve powers of legislation in the fields of defence and external affairs.

1. Lord Hailey, African Survey p. 288.

2. Ibid.

Progress towards eventual responsible and self-government was not without difficulties, however, and each step taken towards this goal increased national consciousness. In one sense the introduction of African majority rule fulfilled the long standing dreams of the African elite. But in the post World War II period it became a focus of discontent.

B. The Indirect Rule:

The technique of governing African people through traditional chiefs and tribal institutions is one of the distinctive features of British Colonial Administration. The father of the system, which is known as Indirect Rule, was Lord Lugard, foremost exponent of the "Dual Mandate". Like his contemporaries, Cecil Rhodes and Sir Harry Johnson, he was largely responsible for adding extensive areas in East and West Africa to the Empire. Lord Lugard later justified these annexations on the ground of economic necessity.

"As long as our policy is one of trade, we are compelled to seek markets, for old ones are being closed to us by hostile tariffs, and our great dependencies, which formerly were consumers of our goods, are now becoming our commercial rivals. It is inherent in great colonial and commercial Empires like ours that they go forward or backward.... We are accountable to posterity that opportunities which now present themselves of extending the sphere of our industrial enterprise are not

neglected, for the opportunities now offered will never occur again."¹

In those days when the soldiers and merchant adventures were opening up Africa, there was no nonsense about "Trusteeship" of Africans and 'paramountcy of native interests'. Nevertheless faced with certain objective problems, the British had to establish a limited 'partnership' with the indigenous ruling elements. This was necessary in order to set up some rude form of government to administer the extensive territories acquired in West Africa after the military power of the feudal autocracies in Northern Nigeria had been broken.

The difficulties of maintaining 'law and order' were increased by the fact that for many years after the British occupation the country was still far from being pacified. Many tribes were hostile and guerrilla bands were in control of areas beyond the British garrisons. Without the co-operation of the traditional ruling class in holding the country together, anarchy would have resulted. The effects of tropical diseases upon Europeans were more deadly in those days than now, when hygienic methods and prophylactic measures insure against ~~the~~ most results of these diseases.

In the early days of this ~~century~~ few white men could be induced to settle in the colonies. Furthermore, the Home

1. Lord Lugard: The Rise of our East African Empire, Vol.II p. 585.

Government was still deeply involved in the Boer War. The War office was in no position to send the re-inforcements which would have enabled Lugard to establish military occupation over every part of the country. It was in these circumstances that Indirect Rule came into being. Lugard was obliged to improvise with the resources at his disposal, in the hope things would turn out well as the British gradually consolidated and extended their grip. So instead of banishing the Sultans, Emirs and other rulers, Lugard called all the leading men in each chieftaincy together and appointed them rulers of their people, under the overall British control. The experiment succeeded beyond expectation. Many changes were eventually made to the system and the re-organised governmental systems of Native Administration was eventually extended throughout Africa.

The essence of Indirect Rule was thus to govern through the traditional source of authority, the European official being there to advise and to supervise. In other words, the Chiefs became instruments and agents of the occupying Power. They could be dismissed by the Governor if they failed to carry out his orders.

African nationalist often bitterly criticised the system as one which either perverted the role of the chiefs by making him a British government officer, or one which propped up forces of

African feudalism.¹ But to its more idealistic exponents it was but a specialised road to self-government. Lugard wrote:

"Liberty and self-government can best be secured to the native population by leaving them free to manage their own affairs through their own rulers."²

Rise of Nationalism:

Nationalism in West Africa did not spring from opposition to settlers as in East and Central Africa so much as from the development of new classes who were detached, in part, from tribal society and made susceptible to European ideas by their role in the new trade which gradually supplanted the slave trade.

The earliest manifestation of African nationalism occurred in the Gold Coast in 1868, when the Fanti chiefs attempted to establish a confederation in order to defend their people against the warlike Ashanti on the one hand, and the political encroachments of the British on the other. Alarmed by the aspirations of the Gold Coast Africans to construct an independent, modern state on the West Coast of Africa, just at the time when the Imperialist Powers were conspiring to carve up the continent and consolidate spheres of influence, the British Lieutenant-Governor at Cape Coast immediately set about to destroy the confederation. The first thing he did was to order the arrest, on a charge of 'conspiracy' of three of the leading Cabinet Ministers of the African Government.

1. Padmore, Africa (1949) pp. 111-128.

2. Lugard, The Dual Mandate in British Tropical Africa (1922).

"This dangerous conspiracy must now be destroyed for good, or the country will become altogether unmanageable", wrote the Governor in a despatch to the Secretary of State for the Colonies. Although the arrested men were subsequently released on the orders of the Home Government, the Confederation was declared illegal. The British authorities in the Gold Coast threatened to "persecute any person or persons committing any overt acts on the part of the Confederation, especially the levying of taxes, assumption of judicial powers, and molestation of peaceful inhabitants following their lawful calling."¹

With the spread of education, more and more of the younger natural rulers were becoming informed and imbued with political ideas approximating those advocated by the Westernised intellectual classes. Africans trained in mission schools were being absorbed into the civil services. It became obvious that such an enlightened and intellectually vigorous middle-class community, acquainted with British political ideas and institutions, could not be fobbed off with indirect Rule. They were not prepared to tolerate the existing British dictatorship exercised by the Governor. This led to the introduction of Africans into the Legislative Councils. The administration, however, did not satisfy the Africans and they continued their agitation for a wide degree of representation.

1. Magnus Sampson, Gold Coast Men of Affairs; Casely Hayford, Gold Coast Native Institutions; Padmore, Africa.

By the time of World War I, which seemed to spell the beginning of the end of European Imperialism and led to the enunciation of doctrines like 'national self-determination', there were several short-lived international movements between American Negro reformers and African nationalists, which stressed the 'Pan-African' ideal. Their aims were modest. The immediate object was the increased participation of Africans in the colonial administration, and not under native administration but their ultimate goal was clear, "that in time, Africa be ruled by consent of Africans."

Colonial rule represented the dominance of a privileged minority and one moreover which was immediately distinguishable by the colour of its skin. Besides, in the last resort and sometimes with little attempt at disguise, the rule of the minority had been established and was inevitably sustained by force; and it was the actions of this minority, in fact its very presence, which set in train the series of social changes which gave birth to the nationalist movements. While these were, at first, limited to the coastal towns, particularly in West Africa, the ideas originated by them and the arguments they advanced were taken up and discussed in the innumerable local societies which were to be found wherever there was a concentration of the literate.

The crucial point came when the recognition of rights was no longer requested but demanded, and it was World War II which

brought matters to a head. The war itself acted as a catalyst speeding up the economic and social changes which arose out of the very nature of the colonial systems. Administrative pressure to produce raw materials, closer government control of economy, an increase in the growth rate of towns and perhaps, above all, inflation without rise in incomes, served to arouse more people than ever before. Support for the nationalist leaders spread inland from the coast, and often this new support implied change to a more radical leadership. African literates perceived the defeats and humiliations suffered by Britain in the early years of the war, and at the end of the war, the continent witnessed the return of thousands of ex-service men, men who were experiencing the aspiration towards re-birth. Conditions were ripe for a change. Disturbed by the growing wave of anti-imperialist movements, the British Government in several of the colonies used its emergency powers to strike at political movements, associations and societies.

The Development of Emergency Powers

In carrying out their policies of nineteenth century colonial expansion, Britain resorted to the sixteenth century method of granting Royal Charters to trading companies. These monopoly companies were the ones that really laid the foundations of most of the present British possessions in Africa.

The idea of a chartered company exercising the powers of government was a very old one in the British Empire - e.g. the East India Company - but it had fallen out of use largely because the early chartered companies had pressed monopolies of trade in the areas under their control which conflicted with the free-trade principle which became established in Britain during the nineteenth century.

Under the charters of these companies was the provision empowering them to make laws for the peace, order and good government of the territories. Thus the Companies made laws for the territories under their jurisdiction, maintained their own armed forces, signed treaties with native rulers and declared war and peace. The Company agents carried the Union Jack into the hinterland of their territories at a time when the Imperial Government was not in a position to assume administrative responsibilities for the territories. However, the Home Government supported the activities of the Companies by putting the services of the Royal Navy at its disposal in crushing all Native resistance to the predatory policy of the traders, who not only robbed but ill-treated the Natives. From time to time the tribes rebelled and burnt down the buildings of the Companies. On several occasions during this period the Royal Navy came to the assistance of the British traders.

In 1889, Cecil John Rhodes acquired a Royal Charter, which conferred greater powers of government than had hitherto been granted to any trading company.¹ It provided inter alia, "S. 3 - The Company is hereby further authorised and empowered, subject to the approval of one of our Principal Secretaries of State (hereinafter referred to as "Our Secretary of State") from time to time, to acquire by any concession agreement grant, treaty, all or any rights interests authorities jurisdictions and powers of any kind or nature whatever, including powers necessary for the purposes of government and the preservation of public order in or for the protection of territories, lands or property comprised or referred to in the concessions and agreements made as aforesaid or affecting other territories, lands or property in Africa, or the inhabitants thereof, and to hold, use and exercise such territories, lands, property, rights, interests, authorities, jurisdictions and powers respectively for the purpose of the Company and on the terms of this Charter.

S. 10 - The Company shall to the best of its ability preserve peace and order in such ways and manners as it shall consider necessary, and may with that object make ordinances (to be approved by our Secretary of State) and may establish and maintain a force of police."²

-
1. Charter of the British South Africa Company, October 28, 1889.
 2. Published in 'London Gazette' of 20th December 1889.

Instances are not unknown of trading company agents taking the law into their own hands and deliberately provoking war with the natives in order to find an excuse to use the Company's armed forces against the tribesmen and annex their lands.

When the British Government officially began to administer its territories in Africa, the Foreign Office merely gave a general guide to the Consul. As a general guide for policy, the Consul had to turn to his instructions from the Foreign Office. Details were left to him on the assumption that the man on the spot was the best qualified to take the initiative. Thus by Order-in-Council, the Consul was empowered to make laws for the peace, order and good government of the territory. He, like the trading companies, could rely on naval aid from time to time for the punishment of any outrages. "In the exercise of the powers and authorities hereby conferred upon him, the High Commissioner may, amongst other things, from time to time by Proclamation provide for the administration of justice, the raising of revenue, and generally for the peace, order and good government of all persons within the limits of this order including the prohibition and punishment of acts tending to disturb the public peace."¹

With the establishment of the Crown Colony system of government, the power to make special laws for the defence of the territory was specifically reserved to the Governor. Royal

1. See IV Order-in-Council May 9, 1891 - Protectorate of South Africa.

Instructions gave the Governor power to declare martial law and direct immediate trial by court martial of all persons owing allegiance to the British Government, who should be taken in arms in open hostility to the government or in the act of opposing its authority by force of arms or in the actual commission of an overt act of rebellion against the estate or in the act of openly aiding and abetting the enemies of the British Government. These powers were, therefore, to be used during the existence of any war¹ in which the government might be engaged as well as during the existence of open rebellion against the authority of the government.

With the rise of nationalism and agitation by educated and literate Africans for more representation in the government, the Governor-in-Council's power to legislate for preservation of public order found ample scope.

In West Africa, because land had not been alienated to European settlers, there was no necessity for Pass Laws and other forms of legislation for controlling and regulating block labour on the lines of those passed in the Southern African territories and Kenya. Nonetheless, repressive legislation of a political character are not wanting. In the teeth of the strongest opposi-

1. Professor Hood Phillips, A history of the Criminal Law of England Vol.1, p.214 sums up the position when he says "What on rare occasions has been called martial law since 1628 by British Constitutional writers has been a state of affairs outside Great Britain, in which owing to civil commotion, the ordinary courts were unable to function and it was therefore necessary to establish military tribunals. It is merely an extended application of the principle... that the Executive is empowered to take any measures necessary for the preservation of public order."

tion from the African members of the Legislative Council of the Gold Coast, the Criminal Code Amendment Ordinance, generally known as the "Sedition Ordinance", was introduced in 1934. Under this law the importation of any books, newspapers or documents which in the opinion of the Governor contain seditious writings, or the possession of them, would render the importer or possessor liable to imprisonment for three years. The innocent receiver of such 'seditious' or prohibited publication was also made liable to imprisonment for one year.

Just before World War II, a similar Sedition Ordinance was enacted in Sierra Leone, together with three others: Incitement to Disaffection Ordinance and Deportation Ordinance and an undesirable Literature Ordinance. They were designed to curb political and industrial organisation of the masses of the people for better social and economic conditions. The regulations gave the Governor power to order the arrest, imprisonment and deportation of 'undesirable' Africans without the right of trial before a Court. The Writ of Habeas Corpus was suspended. Then following the enactment of these measures, a number of African political leaders were imprisoned without trial under the autocratic powers vested in the Governor. This kind of dictatorial law was quite frequently imposed on the people with the support of the British Government. There are records of punitive expeditions sent to assist Governors to suppress insurrections. The Secretary of State for the

Colonies considered it necessary that any tribe which committed overt acts of violence should be punished promptly. The punishment should be followed by such occupation as would ensure that the effects of the punishment would not be lost. Following the rising by the Munshi in the Katsina country of Northern Nigeria in 1907, Lord Elgin, the Secretary of State at the time minuted:

"I am afraid that we must recognise that 'punitive expeditions' cannot conform in all respects to the rule of civilised warfare. I have always opposed them for that very reason But we must use the weapon occasionally in an unsettled hinterland, and then the burning of villages and crops and the carrying off of stock are not 'reprehensible', they are part of the machinery."¹

In the other parts of British Africa, the position was not better. The comparative absence of tropical diseases and the much more temperate weather of the South, East and Central Africa had attracted vast number of European settlers. This eventually created racial problems which were absent in West Africa. Though the vast majority of Africans were unlettered, their illiteracy had not prevented them from developing a racial and national consciousness. One reason was that in Africa news spread quickly and political ideas moved with an on-rush. In most of these territories, the political and social aspirations of the Africans

1. CO.446/62/14060 minute 3. August 1907 quoted by Hyam
op. cit. p. 21.

found expression through the local Congress. Their agitation against any discriminating legislation in politics, educational and industrial fields often led to enactment of repressive measures. An illustrative instance was the enactment of the Collective Punishment Ordinance of 1909 of Nyasaland.¹

In March, 1922, the champion of the East African Association—the pioneer African political organisation in Kenya — was arrested for no other reason than that it rallied displaced tribes-men and tried to protect their land rights. After World War I, the British Government had begun to evict Africans from the highlands in order to make room for white settlers. Following the arrest of the leaders of the East African Association, there had been a general strike and it seemed that the whole African population had gathered spontaneously outside the police headquarters at Nairobi to demand the release of their leader. There was tension, and the strain on the nerves of the police was great. There was firing and several of the Africans were killed and wounded. The news flew over the country and the District Commissioner, fearing a general uprising immediately patrolled the territories with armed police; all meetings were banned and some leading nationalists were deported.²

1. No.5 of 1909. An ordinance which was re-enacted as part of emergency regulations in 1959 — See Chap. 3.

2. Kenyatta, Kenya: The Land of Conflict.

Thus the Ordinance-making power of the Governor-in-Council covered legislation providing for extensive emergency powers, and it was this ordinance-making power that was frequently used in the Colonies up until World War II.

Co-existent with the power of the Governor-in-Council to legislate in the territory is the power of the Imperial Government to enact any legislation specifically for any of its dependencies or to extend the operation of any enactment to any of its dependencies, by virtue of an Order-in-Council made in pursuance of power contained in the enactment. The system of crown colony government was built to accommodate this principle. Hence the mechanism of Crown colony government could be described as the inter-action between the imperial government and the colonial administrators.

At the outbreak of World War II, the Emergency Powers (Defence) Act, 1939 was passed in Britain. This Act empowered "His Majesty.... by Order-in-Council (to) make Regulations as appear to him necessary or expedient for securing the public safety, the defence of the realm, the maintenance of public order and the efficient prosecution of the war and for maintaining supplies and services essential to the life of the community." This Act was extended to all British overseas dependencies or colonies by Order-in-Council made under Section

4 of the Act. Thus the Emergency Powers Order-in-Council 1939¹ became the foundation of all definitive emergency legislation in the African countries within the commonwealth.

The Emergency Powers Order-in-Council 1939 authorised the Governor to proclaim a state of emergency if he thought that there was a serious threat to public order, whereupon he would acquire virtually autocratic legislative and executive powers over persons and property. Section 3 of the Order-in-Council provided:

"The provision of Part II of this Order shall have effect in any territory in which they shall from time to time, in case of any public emergency be brought into operation by proclamation made by the Governor and shall continue in operation until a further proclamation directing that they shall then cease to have effect except as respects things previously done or omitted to be done."

The relevant part of Part II for the purpose of this study - Section 6 - provided that:

"(1) The Governor may make such Regulations as may appear to him to be necessary or expedient for securing the public safety, the defence of the territory, the maintenance of public order and the suppression of mutiny, rebellion, riot and for maintaining supplies and services essential to the life of the community."

1. G. N. 56 of 1939.

This legislation was amended by the Emergency Powers Order in-Council 1956¹ by the substitution of a new section 3. The amendment provided that "if the Governor is satisfied that a public emergency exists he may by proclamation declare that the provision of Part II of this Order² shall come into operation until the Governor by a further proclamation directs that they shall cease to have effect except as regards things previously done or omitted to be done."

(2) A Proclamation under subsection (1) of this section may, if the Governor thinks fit to be made so to apply only to such part of the territory as may be specified in the Proclamation (in this section called 'the emergency area') in which case Regulations made under the said Part II shall, except as otherwise expressly provided in such Regulations, have effect only in the emergency area: provided that for the avoidance of doubt it is hereby declared that the expression 'the territory' in the said Part II shall not be construed as referring only to the emergency area."

The difference between the repealed S. 3 and the new one would seem to be that (a) the new S.3 expressly gave the Governor a discretion to determine whether an emergency exists and (b) it empowered the Governor to proclaim an emergency in part only of a territory.

This provision for an emergency and emergency powers shows the vesting of extraordinary powers, both executive and legisla-

1. S. 1. No. 731 of 1956.

2. Essentially the same as Part II of the 1939 Order-in-Council.

tive in the hands of a single functionary without any safeguard for fundamental rights, and it would thus seem to be a legal and official confirmation of powers which had been utilized all through the early years of colonial administration at the initiative of the Governor. The powers given to the Governor surpassed by far the powers given in England to the British Government and the servants of the Crown under corresponding laws and regulations.

Although, the original Order-in-Council was passed at the time of World War II, the fact that it remained unrevoked and subsequently amended long after the war, put it in the category of permanent legislation rather than a temporary measure as its British parent Act was. Most emergencies which were proclaimed in the Colonies subsequent to the enactment of the Act were proclaimed under the Order-in-Council, and emergency powers which have been evolved and used in all the British Colonies have been based on and sometime originated from the precedent provision in Part II of the Emergency Powers Order-in-Council 1939.

CHAPTER 2

TYPES OF EMERGENCY LEGISLATION

The literal meaning of emergency one might say is a time of crisis and stress for there is no doubt that a period of emergency is a period of unusual strain which makes demands of and imposes great burdens on the state. The nature, magnitude, intensity and impact largely depend on two main factors, viz, its phase and its cause. The greatest and gravest of emergencies can possibly result only from an armed conflict between nations whether it is called war or not. But an emergency need not necessarily arise with the outbreak of an armed conflict. There are, for instance, other conditions of emergency like the threat of internal subversion, which may be, though often is not necessarily related to armed conflict; the emergency caused by a breakdown in the economy; emergency caused by riots, strikes in strategic services and industries, and generally by the breakdown of law and order.

The types of emergencies which stand out in modern times, however, may be classified under three main headings:

1. The actual conduct of war or the preparation to meet its imminent occurrence. In this category may be conveniently placed not only international warfare but also internal armed conflict, i.e. civil war.

2. The threat or presence of internal subversion which may not necessarily be related to armed conflict.
3. The emergency caused by a breakdown or potential breakdown in the economy.

Most modern constitutions do not address themselves very specifically to any of these three great emergencies. In fact, in the African Constitutions under discussion, there is a juxtaposition of the word 'war' with 'emergency'.¹ But they do grant the Government the power to declare war and to provide for the common defence of the State, and they speak in some detail on the subject of emergency.

The three types of emergencies do not possess the same characteristics nor is the judicial attitude towards them always comparable. For example, while some independent African States permit detention without trial during times of war as well as peace, other nations of the world have limited such power to times of war only. It may well be that the African approach merely gives recognition to the realities of modern international relations, where the formal declaration of war is increasingly anachronistic in an era when military success may depend almost entirely on surprise and when external conquest may be most

1. See S. 70, Nigerian Constitution 1963. Also S.11 E.P.A. 1961, Ghana "emergency" includes any crisis.

effectively pursued by methods of internal subversion.

The fact remains that modern Governments do equip themselves with emergency powers by means of legislation, in readiness to meet any emergency whether arising out of war involvement due to external aggression or local emergency due to internal upheaval.

In the newly independent African States within the Commonwealth, there are four main types of legislative provision for dealing with emergencies. They are:-

- (1) The colonial legislation of pre-Independence period which was passed by the Imperial Parliament for all its dependencies.
- (2) Local legislation enacted by the independent sovereign Parliament of the State soon after independence to replace the colonial legislation.
- (3) Emergency-type legislation, which are regarded as permanent statute law which may be used at any time, whether or not there is in existence or in force a proclamation of emergency as provided for in the Constitution.
- (4) Public Security measures which may include the ordinary law and order measures but possibly with extra provision conferring enhanced power on certain officers of law.

1. The Colonial Legislation.

We have already discussed¹ how the need arose for the enactment of emergency legislation by the Imperial Government in Britain for its dependencies. The Emergency Powers Order-in-Council 1939 as amended by the various subsequent orders from 1956-62 was the basis and origin of specific legislative provision for emergency powers in African countries. This statute which was very similar to the British Emergency Powers (Defence) Act, 1939, was intended to be a 'temporary' measure, in the sense that it could only be brought into operation after a proclamation that a state of emergency was in existence and must cease to have effect as soon as the emergency ceased to exist. Some of the independent African Countries, in particular, Kenya and Malawi still retain the Orders-in-Council and because of this, it is necessary to give the text and see the extent and scope of the legislation.

The Emergency Powers Order-in-Council 1939,² authorised the Governor to proclaim a state of emergency; if he thinks that there is a serious threat to public order, whereupon he would acquire virtually autocratic legislative and executive powers over persons and property.

1. See Chapter 1.

2. G. N. 56 of 1939.

Section 3 of the Order provides:

"The provision of Part II of this Order shall have effect in any territory in which they shall from time to time, in case of any public emergency be brought into operation by proclamation made by the Governor, and shall continue in operation until a further proclamation directing that they shall cease to have effect except as respects things previously done or omitted to be done."

The relevant part of Part II for the purpose of this study provides:

"Section 6(1) The Governor may make such regulations as may appear to him to be necessary or expedient for securing the public safety, the defence of the territory, the maintenance of public order and the suppression of mutiny, rebellion, riot and for maintaining supplies and services essential to the life of the community.

2. Without prejudice to the generality of the powers conferred by the preceeding subsection, the regulations may, so far as appears to the Governor to be necessary or expedient for any of the purposes mentioned in that sub-section:

- (a) Make provision for the detention of persons and the deportation and exclusion of persons from the territory.....

- (b) authorise
 - i. the taking of possession or control, on behalf of His Majesty of any property or undertaking.
 - ii. the acquisition on behalf of His Majesty of any property other than land.
- (c) authorise the entering and search of premises.
- (d) provide for amending any law, for suspending the operation of any law for applying any law with or without modification.
- (e) provide for charging in respect of the grant or issue of any licence, permit, certificate or other document for the purposes of the regulations, such fee as may be prescribed by or under the regulations.
- (f) provide for the payment of compensation or remuneration to persons affected by the regulations.
- (g) provide for the apprehension, trial and punishment of any persons offending against the regulations, provided that nothing in this section shall authorise the making of provisions for the trial of persons by Military Courts."

This Order was amended by the Emergency Powers Order-in-Council 1956.¹ But the only substantive change was the substitution of a new Section 3 which provides:

1. S. 1, 1956 No. 731.

"(1) If the Governor is satisfied that a public emergency exists he may by proclamation declare that the provisions of Part II of this Order¹ shall come into operation until the Governor by a further proclamation directs that they shall cease to have effect except as regards things previously done or omitted to be done."

(2) A Proclamation under sub-section (1) of this section, may, if the Governor thinks fit be made so to apply only to such part of the territory as may be specified in the proclamation (in this section called "emergency area") in which case regulations made under the said Part II shall, except as otherwise expressly provided in such regulations, have effect only in the emergency area: provided that for the avoidance of doubt it is hereby declared that the expression 'the territory' in the said Part II shall not be construed as referring only to the emergency area."

The difference between the repealed section 3 and the substituted one would seem to be that (a) the new section 3 expressly gives the Governor a discretion to determine whether an emergency exists and (b) it empowers the Governor to proclaim an emergency in part only of a territory.

The Provisions above show the vesting of extraordinary powers, both executive and legislative in the hands of a simple functionary without any safeguard against abuse. The powers

1. Essentially the same as Part II of the 1939 Order.

given are so extensive that they allow any degree of interference with the citizen. This legislation still constitute part of the law of some African States, with such alterations as are necessitated by the grant of independence in the first place and later by the conversion of such states into republics within the Commonwealth. Now, in both Kenya and Malawi, where the Orders have been retained, it is the President who proclaims a state of public emergency and the President who is authorised to make whatever regulations may be considered necessary for the purposes mentioned in the provisions of the statute.

2. Local Enactments

In all the newly independent African States within the Commonwealth, the colonial emergency legislation was maintained and was provided to be maintained until such a time as the Sovereign Parliament of each state thought fit to replace them by its own legislation. Of the African States within our particular area, only Nigeria, Ghana and Uganda have enacted specific emergency legislation to replace the colonial Orders-in-Council.

Shortly after independence, the operation of the Orders-in-Council in Ghana was terminated by a new Emergency Powers Act, 1957. The 1957 legislation was, however, repealed by the Emergency Powers Act, 1961¹ which is now the current statute.

1. Act 56 - Sec. 12.

It provides, inter alia:

- "1. If the President is satisfied that a state of emergency exists in Ghana or in any part of Ghana, he may, with the approval of the Cabinet, by legislative instrument, proclaim a state of emergency in the whole of Ghana or in that part of Ghana where the emergency exists, as the case may be.
2. (1) Where a state of emergency is proclaimed in the whole of Ghana under Section 1 of this Act it shall be forthwith communicated to the National Assembly. If the National Assembly is not sitting and is not likely to sit within ten days after the proclamation the President shall summon the National Assembly to meet not later than ten days after the proclamation is made.

(2) If the state of emergency is proclaimed in part only of Ghana it shall be communicated to the National Assembly at once if it is sitting or, if not, as soon as it meets.
3. (1) On the making of a proclamation under section 1 of this Act, the President with the approval of the cabinet may, by legislative instrument, make such regulations as he may consider necessary or expedient for securing the public safety, the defence of Ghana, the maintenance of public order, the efficient prosecution of any war in which the Republic may be engaged, and for maintaining supplies and services essential to the community in the whole or any part of Ghana.

(2) Without prejudice to the generality of sub-section (1) regulations may be made under this section for the following purposes -

(a) in the case of an emergency affecting the whole of Ghana -

(i) the detention of persons or the restriction of their movements;

(ii) the deportation and exclusion from Ghana of persons not being citizens of Ghana;

(iii) the prevention of assistance to an enemy in case of war.

(b) in the case of an emergency affecting only part of Ghana, the detention of any person for the commission of any act in relation to the state of emergency and the exclusion of any person from the emergency area;

(c) in the case of an emergency affecting the whole or any part of Ghana -

(i) taking possession or control, on behalf of the Republic, of any property or undertaking;

(ii) the acquisition of any property other than land;

(iii) entering and search any premises;

(iv) amending any law, or suspending the operation of any law;

- (v) charging, in respect of the grant or issue of any licence, permit, certificate or other documents for the purposes of the regulations, such fee as may be prescribed by or under the regulations;
 - (vi) payment of compensation and remuneration to persons affected by the regulations;
 - (vii) imposing penalties for the breach of any of the regulations not exceeding imprisonment for five years or a fine of £500 or both;
 - (viii) the apprehension, trial and punishment of persons offending against the regulations.
- (3) Where a state of emergency is proclaimed in respect of a part only of Ghana regulations made under this section shall only apply in that part.
- (4) Regulations made under section 3 of this Act -
- (a) may empower authorities or persons specified in the regulations to make orders or rules for any of the purposes for which regulations are authorised by this Act to be made;
 - (b) may contain such incidental and supplementary provisions as appear to the President with the approval of the Cabinet to be necessary or expedient for the purposes of the regulations.

7. Regulations or other instruments made under the provisions of this Act shall have effect notwithstanding anything inconsistent therewith in any law; and any provision of a law which may be inconsistent therewith in any law; and any provision of a law which may be inconsistent with any such regulation or

instrument shall, to the extent of such inconsistency have no effect so long as the regulation or other instrument is in force.

11. In this Act, unless the context otherwise require - "emergency" includes any emergency arising out of any action taken or immediately threatened whether in or outside Ghana by any person or persons and from its nature or scale likely to be prejudicial in Ghana to the public safety or public order or public health, or to deprive any substantial portion of the community of the essentials of life, or to interfere in any way with Government services and also includes any emergency arising out of an event due to natural causes with or without human intervention;"

In Uganda, the colonial Emergency Powers Orders-in-Council were continued in existence until the 26th February, 1963,¹ several months after independence had been granted, when the National Assembly enacted the Emergency Powers Act, 1963,² section 6 of which provides that:

"On the commencement of this Act the Emergency Powers Orders-in-Council 1939 to 1961, shall cease to have effect as part of the law of Uganda."

1. Uganda (Independence) Order in Council had provided that they would cease to have effect on March 9, 1963, if not repealed earlier by Parliament.

2. Cap. 307.

The provisions of the Emergency Powers Act, 1963 of Uganda on a superficial reading, seem very similar to the Ghana Act of the same name and to the Nigerian Act too. But in each of the states, there are substantial differences which make it necessary to quote in detail some of the provisions in order to appreciate the differences.

The Emergency Powers Act, 1963 of Uganda provides, inter alia:

- "2. In this Act, unless the context otherwise requires - 'emergency proclamation' means a proclamation under section 30 of the Constitution declaring that a state of public emergency exists.
3. (1) Wherever an emergency proclamation is in force the Governor-General may make such regulations as appear to him to be necessary or expedient for securing the public safety, the defence of Uganda, the maintenance of public order and the suppression of mutiny, rebellion, riot and for maintaining supplies and services essential to the life of the community.
- (2) Without prejudice to the generality of the powers conferred by sub-section (1) of this section, emergency regulations may so far as appears to the Governor-General to be necessary or expedient for any of the purposes mentioned in that sub-section -

- (a) make provision for the detention of persons or the restriction of their movements, and for the deportation and exclusion from Uganda of persons who are not citizens of Uganda.
- (b) authorise -
 - (i) the taking of possession or control on behalf of the Government of any property or undertaking;
 - (ii) the acquisition on behalf of the Government of any property other than land.
- (c) authorise the entering and search of any premises
- (d) provide for amending any law, for suspending the operation of any law, and for applying any law with or without modification;
- (e) provide for charging, in respect of the grant or issue of any licence, permit, certificate, or other document for the purposes of the regulation, such fee as may be prescribed by or under the regulations;
- (f) provide for payment of compensation and remuneration to person affected by the regulations;
- (g) provide for the apprehension, trial, and punishment of persons offending against the regulations:

Provided that nothing in this section shall authorise the making of provisions for the trial of persons by Military Courts.

(3) Emergency regulations may provide for empowering such authorities or persons as may be specified in the regulations to make orders and rules for any of the purposes for which such regulations are authorised by this Act to be made, ~~and~~

and may contain such incidental and supplementary provisions as appear to the Governor-General to be necessary or expedient for the purposes of the regulation.

(4) Emergency regulations shall specify the area to which they apply, and may contain provision for the exclusion of persons from the area so specified if it consists of only a part of Uganda.

4. (1) Emergency regulations and any orders or rules made in pursuance of emergency regulations shall have effect notwithstanding anything inconsistent therewith contained in any law; and any provision of a law which may be inconsistent with any emergency regulation or any such order or rule shall, whether or not that provision has been amended, modified or suspended in its operation under section 3 of this Act, to the extent of such inconsistency have no effect so long as such regulation order or rule remains in force."

In Nigeria, the Emergency Powers Act, 1961 which became law on March 30, 1961 replaced the colonial legislation. By section 6 of the Nigeria (Constitution) Order-in-Council 1960, the Emergency Powers Orders-in-Council 1939 to 1959 were retained in force until "the thirtieth day of March, 1961, or such earlier date as may be prescribed by the Parliament of the Federation of Nigeria." In other words, this emergency legis-

lation was to be on the statute book before the necessity to use it should arise. It provides, inter alia that:

"3.(1) During a period of emergency, the Governor-General-in-Council may make such regulations as appear to him to be necessary or expedient for the purpose of maintaining and securing peace order and good government in Nigeria or any part thereof.

(2) Without prejudice to the generality of the powers conferred by sub-section (1), the regulations may, so far as appear to the Governor-General-in-Council to be necessary or expedient for any of the purposes mentioned in that sub-section -

(a) make provision for the detention of persons and the deportation and exclusion of persons from Nigeria or any part thereof.

(b) authorise -

(i) the taking of possession or control on behalf of the Government of the Federation any property or undertaking.

(ii) the acquisition on behalf of the Government of the Federation of any property other than land.

(c) authorise the entering and search of any premises.

(d) provide for amending any law, for suspending the operation of any law and for applying any law with or without modification.

- (e) provide for charging in respect of the grant or issue of any licence, permit, certificate or other document for the purposes of the regulations such fee as may be prescribed by or under the regulations.
- (f) provide for payment of compensation and remuneration to persons affected by the regulations.
- (g) provide for the apprehension, trial and punishment of persons offending against the regulations.
- (h) provide for maintaining such supplies and services as are, in the opinion of the Governor-General-in-Council, essential to the life of the Community.

Provided that nothing in this sub-section shall authorise the making of provision for the trial of persons by Military Courts.

(3) The payment of any compensation or remuneration under the provisions of such regulation shall be a charge upon the Consolidated Revenue Fund of the Federation,

(4) Regulations made under this sub-section shall apply to the whole of Nigeria or to such part or parts thereof as may be specified in the regulations.

4. Regulations made under section 3 may provide for empowering such authorities or persons as may be specified in the regulations to make orders and rules for any of the purposes for which the regulations are authorised by this Act to be made and may contain such incidental and supplementary provisions as appear to the Governor-General-in-Council to be necessary or expedient for the purposes of the regulations.

6. Every regulation made under section 3 and every order or rule made in pursuance of such a regulation shall have effect notwithstanding anything inconsistent therewith contained in any law; and any provision of a law which is inconsistent with any such regulation order or rule shall, whether that provision has or has not been amended modified or suspended in its operation under this Act, to the extent of such inconsistency have no effect so long as such regulations order or rule remain in force.

7. Every document purporting to be an instrument made or issued by the Governor-General-in-Council or any other authority or person in pursuance of this Act, or of any regulation made under section 3 and to be signed by or on behalf of the Governor-General-in-Council or such other authority or person, shall be received in evidence and shall until the contrary is proved, be deemed to be an instrument made or issued by the Governor-General-in-Council or that authority or person."

It is obvious that draftsmen of the Local enactments have substantially re-enacted the colonial legislation, and this accounts for the similarities in wording and provision between the three countries under consideration. However, several additions and divergencies have been made in the local enactments. The Ghana legislation is much more comprehensive than those of Nigeria and Uganda. Whereas, in Ghana, there is specific distinction between a 'national' emergency and 'local'

emergency, no such distinction is particularly stressed in either of the other two countries. The powers which may be assumed in a national emergency, that is, an emergency involving the whole of the country, are far more extensive than those necessary for a localised emergency.¹ Therefore, whereas in Ghana when a state of emergency is proclaimed in a particular area, any regulations made will apply only to that area, in both Uganda and Nigeria regulations may be general in terms and then specified to any area in which the need should arise.

Only in Ghana is the penalty for breach of a regulation specifically laid down,² and thus defining the scope of judicial interference and only in Nigeria is it provided that the payment of compensation and remuneration to persons affected by any regulations shall be charged on the Consolidated Revenue Fund.³ It is assumed that this unusual provision is made in order to ensure the minimum possible delay in ensuring payment and moreover provide a measure of security for those who will be innocently affected since the Consolidated Revenue Fund is not subjected to annual parliamentary approval.

A difference of some importance also occurs in the Nigerian enactment. It is provided that regulations may authorise the deportation and exclusion of persons from Nigeria or any part thereof, without any specification as in Ghana and Uganda, that

1. Sec. 3(2)(a) and (b).

2. Sec.3(2)(c)(vii) E. P. A. 1961 Ghana

3. Sec.3(3) E. P. A. 1961 Nigeria.

such persons must not be citizens of the country. While it is quite acceptable that the provision may mean that a citizen may be deported from one part of the country to another, yet the lack of specification could create some important practical difficulties where an order is made purporting to deport or exclude from the country a citizen of the country. No country is legally bound to accept nationals of other countries, the situation could, therefore, arise that if no country is prepared to accept a deported Nigerian citizen, the latter is placed in the unenviable position of spending his life on the seas unless the deportation order is revoked. Where the citizenship of the deported person is in doubt, of-course, the burden of proving that he belongs to any particular country lies on him.

Lastly, there are notable differences in the provisions for laying regulations before Parliament, which we shall consider later.¹ There is no doubt, however, that all the enactments confer very formidable powers on the Executive. Taking a purely legalistic approach, the power of the executive to make rules and regulations having legislative effect is derived from the express mandate of Parliament.

Perhaps the only consolation is in the fact that the powers created for the executive can be of only temporary duration.

1. See Chap. Six.

Emergency-type legislation:

Most of the countries within this area of study leave it to the Executive to declare or proclaim a state of public emergency, but within a stated period of time, the Executive must obtain Parliamentary confirmation of its decision. Amongst the grounds on which a declaration of emergency might be justified is that "democratic institution are threatened by subversion."¹ It is to deal with this type of emergency that some of these African states, in particular Ghana and Tanzania, have enacted a standing legislation to be used as and when the occasion arises without the need necessarily to proclaim or declare a state of public emergency. These enactments provide the Executive with the power of preventive detention. The preventive detention legislation of both Ghana and Tanzania, called Preventive Detention Acts,² are very similar indeed and the differences are so few that it is proposed to quote here only that of Tanzania as an example of the scope of such legislation. Besides, the Ghana Act has now been repealed.

The Preventive Detention Act, 1962,³ of Tangayika provides, inter alia:

"2 - (1) Where -

-
1. See S.70(3)(c) of Nigerian Constitution 1963.
 2. Preventive Detention Act 1958 of Ghana as amended by 1961 Act and 1964 Act.
 3. Act No. 60 of 1962.

- (a) It is shown to the satisfaction of the President that any person is conducting himself so as to be dangerous to peace and good order in any part of Tangayika or the security of the state, or
- (b) The President is satisfied that an order under this section is necessary to prevent any person acting in a manner prejudicial to peace and good order in any part of Tanganyika, or the defence of Tanganyika or the security of the State, the President may, by order under his hand and the Public Seal, direct the detention of that person.

(2) Unless the President is satisfied that it is not feasible or practicable to require that any particular item of information shall be given on oath, he shall require that any information on which he satisfied himself that a person is conducting himself or acting in any manner aforesaid or that it is necessary that an order be made, as the case may be, shall be given on oath.

3. No order made under this Act shall be questioned in any Court.

4. (1) An order under this Act shall constitute an authority to any police officer to arrest the person in respect of whom it is made and for any police officer or prison officer to detain such person as a civil prisoner in custody or in prison; and such person shall, while detained in pursuance of the order, be in lawful custody.

(2) The President may make regulation -

- (a) applying to persons detained under orders made under this Act, any of the provisions of the Prisons Ordinance or of any rules made thereunder relating to convicted criminal prisoners and dis-applying in relation to such persons any of such provisions relating to civil prisoners; and
- (b) prohibiting, regulating and controlling visits to, and correspondence to or from, such persons; and where the President makes any such regulations, the Prisons Ordinance and any rules made thereunder shall have effect in relation to such persons subject to the provisions of such regulations.

5. The President may -

- (a) rescind any order made under this Act;
- (b) direct that the operation of an order made under this Act be suspended subject to such conditions, if any, as may be specified in such direction.
 - (i) requiring the person in respect of whom the order is made to notify his movements in such manner, at such times and to such authority or person as may be so specified; and
 - (ii) requiring him to enter into a bond with or without securities for the observance of any such conditions aforesaid; and if that person fails to comply with a condition attached to such a direction, he shall, whether or not the direction is revoked, be detained under the original order.

6. A person detained under this Act shall, not later, than fifteen days from the beginning of his detention, be informed of the grounds on which he is being detained and shall be afforded an opportunity of making representations in writing to the President with respect to the order under which he is detained.

7. - (1) There shall be an Advisory Committee which shall consist of

(a) a Chairman and two members appointed by the President, and (b) Two members appointed by the Chief Justice.

(2) A member of the Advisory Committee may resign his membership by writing under his hand addressed to the person by whom he was appointed.

(3) The quorum of the Advisory Committee shall be three, of whom one shall be the Chairman, one shall be another member appointed by the President and one shall be a member appointed by the Chief Justice.

(4) The President shall refer to the Advisory Committee every order made under the Act -

(a) where representations have been made in pursuance of section 6 as soon as may be after the making of such representations.

(b) where no such representations have been made, within a year of the order being made and thereafter at intervals not exceeding a year (unless such order has previously been rescinded), and shall inform the Committee of the ground on

which the order was made and such other matters relating to the person detained as are relevant to his continued detention, and shall provide the Committee with a copy of all representations made by the person detained.

(5) The Committee shall be afforded an opportunity of interviewing any person detained under the order referred to them under this section, at any place where such person is detained.

(6) The Committee shall advise the President whether, in their opinion, an order made under this Act should be continued or rescinded or suspended, but the President shall not be required to act in accordance with the advice of the Committee.

Unlike its Tanganyika counterpart, the Ghanaian legislation was to be temporary, as preventive detention was never intended to be "part of the permanent system of government,"¹ and therefore, five years duration was stipulated though this could be extended by resolution of Parliament for a further three years. In 1963, the Act² was given a fresh five years term. By its provisions, the President was empowered to order the detention of any citizen of Ghana - in Tanzania it is "any person" - if satisfied that it was necessary to prevent him from acting in a manner prejudicial to the security of the State.³ The detention

1. W. P. No. 7/61 p. 34.

2. Act 17. Preventive Detention Act 1958 as amended by 1962 and 1963 Preventive Detention (Amendment) Acts. The 1964 Act, Act 240, 1964 which amended and consolidated the existing law has now been repealed.

3. See 2 P. D. A. 1962.

could be for an initial period of five years - whereas there is neither a minimum nor a maximum period in Tanzania - which the President could extend for another five years at any time before the expiration of the initial period. As in Tanzania, the detainee could make representations in writing to the President, but unlike Tanzania, the right of access to the Court was not expressly forbidden.

Whilst only Ghana and Tanzania of the African States within the area of this study have so far enacted specific preventive detention legislation, there is provision in the Constitution for all of them for the enactment of such laws, when it is necessary in the interest of public security and the defence of the state. The question must, therefore, inevitably arise whether or not a nation should have preventive detention legislation as a regular feature of law. Must a nation depend, particularly when an emergency is not in existence, for protecting the security of the State or public order or the supplies of commodities essential to the community on laws of preventive detention? Or should the nation perfect the ordinary criminal law machinery, by suitably amending existing laws if their constitutionality has become questionable; by reinforcing them if their provisions are discovered to be insufficient; and by improving the intelli-

gence, prosecution and other means of the Executive, if these are unequal to the task of bringing offenders to book under the ordinary criminal law?

The opinion of the African leaders are well illustrated in the following extracts. President Nyerere of Tanzania,¹ whilst realising that preventive detention is a very serious matter because "it means that you are imprisoning a man, when he has not broken any written law, when you cannot be sure of proving beyond reasonable doubt that he has done so Few things are more dangerous to the freedom of a society than that. For freedom is indivisible, and with such an opportunity open to the Government, the freedom of every subject is reduced." Yet, he believed that in preserving national security other principles conflict, and "our ideals must guide and not blind us", and, therefore, he would rather have legislation which can be speedily made operative. He asserted,

"In the idealistic sense of the word, it is 'better' that 99 guilty men should go free rather than one innocent man being punished. But in the circumstances of a nation like ours, other factors have to be taken into account. Here, in this Union, conditions may well arise in which it is better that 99 innocent people should suffer temporary detention than that one possible traitor should wreck the nation; it would certainly be complete madness to let 99 guilty men escape in order to avoid the risk of punishing one innocent person."²

1. Speech inaugurating the University, Dar-es-Salaam as quoted by Franck; Comparative Constitution Process p. 231.

2. Ibid.

That is as may be, but if the nation were so much in danger which must be obvious to the majority of the nation, might it not be more representative of mass will to have a declaration of an emergency as provided for in the Constitution, thus bringing into operation the emergency legislation which is subject to control by the representatives of the people in the National Assembly rather than have power concentrated in the hands of one man, the President, on whom alone such extensive discretionary power has been conferred and the exercise of whose discretion is virtually absolute, in spite of the provision for an Advisory Committee?¹

On the same question, President Kaunda of Zambia, wrote:

"When a state of war exists, all nations restrict certain freedoms in the interest of national survival. The new states of Africa are in such a condition of national mobilisation. They are at war against terrible though impersonal enemies. There is not time for endless debate and arguing [which the procedure for proclamation of a state of public emergency in accordance with constitutional provisions would entail]. Decisions have to be taken quickly and decisively. Inevitably, therefore, the Legislature ceases to be the major force of power. It is not unimportant as a forum of national debate and a sounding board of public opinion. But most leaders in the new Africa find themselves having to take initiatives and formulate policies which in the

1. This will be discussed under Safeguards to abuse of Power in the Chap. Six.

older societies of the West would emerge from the somewhat leisurely process of parliamentary debate I believe that men may be truly free when serving dedicated nation which in the interests of survival has to control to a certain extent their freedoms."¹

One cannot quarrel with the last sentence of this opinion because it is in recognition of this necessity that most nations provide for emergency by legislation but one cannot say that it is sufficient justification for extra-emergency-type legislation as a permanent feature of the law. It could well amount to the citizenry living in a permanent state of emergency.

Other Public Security Measures

Apart from the definitive emergency legislation which can be brought into operation only after a proclamation that a state of emergency exists, and those permanent emergency-type legislation mainly meant to be used to deal with subversion or threatened subversion by internal forces within the State, most countries have other legislation directed at preserving public order generally, which may be used as an integral part of the plan to deal with emergency. Under this heading must come the various Public Order Acts, Preservation of Public Security legislation and also the ordinary Criminal law of the land. It is not proposed to dwell on the latter but it is proposed to have a look at one of the other types of legislation. Such

1. Colin Morris, A humanist in Africa: Letters to Colin Morris by Kaunda p. 108.

powers as are conferred by this type of legislation are usually in addition to and never in derogation of whatever powers may be conferred by the actual emergency legislation. Thus, after the end of the Mau Mau Emergency in Kenya in 1960, it was proposed to transform a few essential emergency powers into ordinary law and the Preservation of Public Security Act was enacted. The Act which is in three parts defines "preservation of public security" thus:

"2. In this Act includes -

- (a) the defence of territory and people of Kenya;
- (b) the securing of the fundamental rights and freedoms of the individual;
- (c) the securing of the safety of persons and property;
- (d) the prevention and suppression of rebellion, mutiny, violence, intimidation, disorder and ervince, and unlawful attempts and conspiracies to overthrow the Government or the Constitution;
- (e) the maintenance of the administration of justice;
- (f) the provision of a sufficiency of the supplies and services essential to the life and wellbeing of the community, their equitable distribution and availability at fair prices; and
- (g) the provision of administrative and remedial measures during periods of actual or apprehensible national danger or calamity, or in conse-

quence of any disaster or destruction arising from natural causes."¹

Then the Act empowers the President to bring into operation by notice published in the Gazette, Part II of the Act if it appears to him "that it is necessary for the preservation of public security to do so,"² section 3 sub-section 2 of which provides:-

"Where a notice under sub-section (ii) of this section has been published, and so long as the notice is in force, it shall be lawful for the President, to the extent to which this Act is brought into operation, and subject to the Constitution, to make regulations for the preservation of public security."

The power to make regulations is very extensive indeed and may cover any of several matters which can also be covered during a period of emergency. In fact this situation is visualised in the Constitution itself because the language used in Section 29 of the Republican Constitution 1964 is virtually the same as the provision for an emergency. It states: (in part)

"(1) If at any time it appears to the President that it is necessary for the preservation of public security to do so, he may by notice published in the Gazette declare that Part II

-
1. A definition very similar to the definition of 'emergency' under S. 11 of the E. P. A. (Ghana), 1961.
 2. Sec. 3(1).

of the Preservation of Public Security Act 1960 shall come into operation in Kenya or in any part."

The various matters, among others, on which regulations may be made are specified in Part II of the Act. Regulations may make provision for - Section 4. Sub-section (2)

- "(2) - (a) the detention of persons;
- (b) the registration, restriction of movement (into, out of or within Kenya), and compulsory movement of persons, including the imposition of curfew;
- (c) the control of aliens, including the removal of diplomatic privileges;
- (d) the censorship, control or prohibition of the communications of information or of any means of communicating or of recording ideas or information, including any publication or document, and the prevention of dissemination of false reports;
- (e) the control or prohibition of the acquisition, possession, disposition or use of any movable or immovable property or undertaking;
- (f) the compulsory acquisition, requisitioning, control or disposition of any movable or immovable property or undertaking;
- (g) requiring persons to do work or render services, including the direction of labour and supplies, the conscription of persons into any of the disciplined forces (including the National Youth Service) and the billeting of persons;

- (h) the control and regulation of harbours, ports and the movement of vessels;
- (i) the control and regulation of transport by land, air or water;
- (j) the control of trading and of the prices of goods and services, including the regulation of the exportation, importation, production, manufacture or use of any property or thing;
- (k) amending, applying with or without modification or suspending the operation of any law (including legislation of the Organisation) other than this Act or the Constitution.
- (l) any matter, not being a matter specified in any of the foregoing paragraphs of this sub-section, for which provision is necessary or expedient for the preservation of public security."

Thus, if the specified matters should have inadvertently left any subject matter affecting the citizens or their lives out of the long and particularly comprehensive list, as one might think, the final paragraph of the sub-section gives a 'cover-all', and the only limitation to this overwhelming delegation of powers would seem to be contained in section 3 sub-section 3, (Part II) of the Act, which states: (in part)

"Provided that, subject to sub-section (4) of this section, such regulations shall not make any provision which -

- (i) is inconsistent with or in contravention of Section 16 of the Constitution (which protects the right to personal liberty); or sub-section 26 of the Constitution (which provides protection from discrimination), or any other provision of the Constitution; or
- (ii) purports to amend, modify, or suspend the operation of, any written law other than regulations made under this Act."

This proviso would, therefore, seem to distinguish the operation of powers under this Act from the operation of powers under the proper emergency legislation which allows derogation from both sections 16 and 26 of the Constitution by measures which are 'reasonably justifiable' for the purpose of dealing with the emergency situation that exists." However, sub-section (4) of this section immediately excludes from the proviso, emergency of war, and also any measures relating to land rights if such measures are reasonably justifiable in a democratic society. It states:

"(4) The proviso to sub-section (3) of this section shall not apply during any period when Kenya is at war or to any regulations in so far as they apply to the parts of Kenya to which section 19 of the Kenya Independence Order-in-Council 1963 applies."

Similar circumstances ~~to~~ Kenya, gave occasion for the enactment of the Malawi (Nyasaland) Preservation of Public Security Act, 1960. At the end of the crisis of 1959 and the revocation of the Emergency Powers Orders-in-Council 1939-59 and regulations made thereunder to deal with the situation, it was felt that there was need for some transitional emergency-type powers for the restoration of security and public peace.

The enabling provisions of the Act are the same as in Kenya, but whereas the provision in Kenya allows any regulations to be made covering any matter not specified in the Act if it is "necessary and expedient", in Malawi, such regulations are allowed only if they appear to the Minister "to be strictly required by the exigencies of the situation in Malawi." It would seem that the discretion allowed in Malawi is less extensive than in Kenya, perhaps this is so because it is the President on whom the powers are conferred in Kenya whilst in Malawi, it is the Minister, though no doubt in practice a Minister would most likely undertake the responsibility on behalf of the President of Kenya.

The definition of public security in Malawi is less comprehensive than that of Kenya, and noticeably does not specify the securing of fundamental rights and freedoms of the individual.

Perhaps this also accounts for the absence of such provision as the proviso to section 3 of sub-section 3 of the Kenya Act, which prevents derogation from certain fundamental rights. In section 2 Preservation of Public Security Act 1960 of Malawi, public security includes "the security of the safety of persons and property, the maintenance of supplies and services essential to the life of the community, the prevention and suppression of violence, intimidation, disorder and crime, the maintenance of the administration of justice and the prevention and suppression of mutiny, rebellion and concerted defiance of and disobedience to lawfully constituted authority and the laws in force in Malawi."

However, it is not always the need for transitional provisions following a period of emergency which has necessitated all or by any means a large majority of the security measures in Africa. There is, for instance, in Ghana, a Public Order Act¹ which has nothing to do with emergency as such but which deals with a number of measures which may be used in dealing with an emergency situation. It contains provisions for dealing with public meetings and processions by giving enhanced powers to the Police, provision for imposition of curfews in the interest of maintenance of peace, penalties for carrying or possession of arms and ammunition and several other related matters.

1. Act 58, 1961.

It must be remembered that the ordinary law too may confer on the Executive powers more numerous and equally as wide as those conferred by the emergency legislation strictly so named, and as already mentioned, action under the ordinary law may constitute an integral part of the plan to deal with an emergency. Thus, the banning of a party may take place under the Criminal or Penal Code, as for instance, the banning of the Congress Party in Nyasaland (Malawi) under Section 70 of the Penal Code.

It will thus have been observed that the difference between the ordinary law or public security measures and emergency laws of the newly independent African States within the Commonwealth would seem to be more of degree and procedure rather than of kind. Under the semi-emergency laws and public security measures, the executive enjoy as much power to cope with an emergency as they do under emergency laws properly so called; it is, therefore, for this reason that they have been classified as emergency legislation. The point of importance is that all these laws confer very wide discretion, sometimes dangerously wide, on the executive.

C O M M E N T

The year 1960 was the great year of African independence, though the graduation ceremony began a few years earlier. By 1964 virtually the whole continent had become independent. The first step after independence was for the new rulers to consolidate their power. Beset by economic and social problems to which solutions must be found, the new rulers must do what they can with what they have at hand. Political activity can still erupt into violence at a moment's notice and as a result Governments are disposed to tighten rather than relax their grip. That most of the newly-independent African States within the Commonwealth have used similar means to keep the wheel of Government on an even keel is probably more due to their common heritage than the need to emulate one another. As regards emergency powers they have all followed by and large the precedent set by the Emergency Powers Orders-in-Council 1939-56. In fact, the Independence Constitution of each State provides that these Orders shall remain in force after independence until and unless replaced by legislation passed by the Sovereign Parliament of the Independence State.¹ Thus they all retained the colonial legislation for a transitional period, but almost all of them have replaced that enactment with local legislation.

1. E. g. Sec. 6 of the Nigerian (Independence) Constitution 1960.

It has been seen, however, that while all of them have emergency legislation of a temporary nature which the Consitution allows to be brought into operation only on a proclamation of a state of public emergency in accordance with constitutionally laid down procedure, many of them have enacted emergency-type legislation of a permanent nature which can be brought into operation at any time on the ground that it is necessary for public security.¹

1. E. g. Preventive Detention Act 1962 of Tanzania.

CHAPTER THREE
USE OF EMERGENCY POWERS

The issue during an emergency is how to reconcile the democratic idea of the freedom of the subject with the need for the preservation of the State. Two major attitudes have in the course of centuries become established. The attitude which lays emphasis on the Duty rather than Right of the subject and therefore regard the State as being more important than the individual, and the attitude which believes that the correct emphasis should be on Right rather than Duty and which asserts that the individual does not exist merely to serve the ends of the State. Each has its own justification. Undue glorification of human rights tends to make the individual lose his sense of social obligation towards his fellow men and yet in order to achieve the good of the whole community, there must be active participation and co-operation between the Governors and the governed.

Nevertheless, the government must be able to move against those who take arms against it, whether nationally or internationally as well as protect the security and essential services for the community. The constituted authority has the right of self-preservation. Those who run the state have onerous responsibilities and private rights may often have to be subordinated to the public good.

The central purpose of the legislature in respect of defence is the protection of the State and it necessarily provides all the means of establishing all the legal machinery and legal provisions considered necessary and appropriate for the purpose. The responsibility for the practical measures taken in order to protect the country must belong to the Executive. The prosecution of a war or suppression of subversion is of necessity an executive function and has always been so conceived, hence as we have observed, under the delegated power and sometimes by direct enactment, the very widest discretion are vested in the Executive. Common experience shows that in times of emergency the Executive is authorised, according to its opinion, to give directions or determination in derogation of the freedom of action and the personal rights of men and of associations of men. The reason is that administrative control of the liberty of the individual in aspects considered material for the purpose of the emergency is regarded as a necessary or proper incident of fighting the emergency.

One man may be suspected of treasonable propensities and restrained and yet another may be prevented from free association. What the power will enable the Executive to do at any given moment or time depends upon what the exigencies of the time may be considered to call for or warrant. The meaning of the power may, of course, be fixed as it usually is, but as, according to that meaning, the fulfilment of the object of the power must

depend on the ever changing course of events; the practical application of the power will vary accordingly.

The fact remains that the Governments have equipped themselves, like most modern Governments, with emergency powers in readiness to meet any emergency whether arising out of war involvement due to external aggression or local emergency due to internal upheaval. There is no doubt that emergency power when wielded can extend to every matter and activity so related to the emergency as substantially to affect every aspect of life of the citizens within the State. A proclamation of emergency, ipso facto, confers extensive and vast discretionary powers on the Executive. It is now proposed to consider the practical application of such powers.

PRE-INDEPENDENCE.

THE NYASALAND CRISIS.

It would seem that in large measure emergency powers were used by the colonial masters mainly to curb anti-government activities, which were regarded as subversive. Between the years following the end of the second World War and the beginning of African decade of independence, 1960, there were no less than twenty-nine declarations or proclamations of states of emergency in British dependent territories.¹ It is impossible, therefore, to cover all these proclamations to illustrate the practical application of emergency powers, hence, it is proposed to take the Nyasaland crisis of 1959

1. See D.C. Holland in "Emergency Legislation in the Commonwealth" in 13 Current Legal Problems (1960) p. 148

and the Kenya Mau Mau Emergency of 1952 - 60 as illustrative examples.

On March 2, 1959, the Governor of Nyasaland (now Malawi) proclaimed a state of public emergency within Nyasaland Protectorate, whereupon Part II of the Emergency Powers Orders-in-Council 1956 came into operation within the territory and the Emergency Regulations, 1959, were made thereunder.

The causes of the need for the emergency are many and probably go back to the beginning of British rule in the territory, but the immediate and probably main cause was political disaffection with the Government by Africans on the creation of the Federation of Rhodesia and Nyasaland, added to the fact that African demand for representational parity with the whites in the legislative Council was rejected by then Colonial Secretary, Mr. Lennox-Boyd. The African enthusiasm for freedom and the end of the "stupid so-called Federation", translated itself into belligerence. By the end of 1958, an atmosphere of tension pervaded the territory. The Congress Party - the main African Party, and its leaders felt that they had exhausted the available channels of constitutional protests. The Government had ignored their protests and the Colonial Secretary had refused to give nationalist delegations any cause to rejoice. As the settlers ceaselessly imprecated the nationalists and demanded repression

of their governments, so the nationalists grew increasingly restless. Thereafter, series of branch meetings of the Congress were being held and deliberate disobedience of instructions issued by the police and/or District Commissioners appeared to form part of a carefully co-ordinated plan of resistance. It is not clear whether violence was either contemplated or planned. At any rate, there were some reported incidents of violence and towards the end of February 1959. The Governor asked for and received police reinforcements from the other Central African States, then the Congress Party was banned, and following this, several of its leaders and members were arrested.

At the time of the proclamation, the official reason given by Governor Armitage was that "day by day it had become increasingly apparent that the Congress was bent on pursuing a course of violence, intimidation and disregard of lawful authority"¹. Later he added that the Congress had plotted to murder all whites resident in Nyasaland.²

1. Quoted in Cmnd 814 (1959) p. 87.

2. Nyasaland, State of Emergency Cmnd 707 (1959) The Commission of Inquiry (the Devlin Commission) found absolutely no form of evidence to substantiate the allegations of a "murder plot". See Cmnd 814 (1959) pp. 86 - 88.

The Emergency Regulation, 1959, made pursuant to the proclamation provided a comprehensive code giving the administrative authorities extensive powers over persons and property. One of the main regulations was Regulation 24 which authorised detention without trial. Under the regulation, the Governor could make a detention order whenever he was satisfied that it was necessary for the purpose of maintaining order. There was no time limit imposed for such detention, but the Governor was required to review the order at six monthly intervals in order to consider whether it should be revoked, varied, or suspended "having regard to the circumstances of the case." In addition, the Governor could revoke or vary the order or suspend it subject to such conditions as to residence, employment, association with other persons or other similar matters at any time as he thought fit. Furthermore, a person detained had a right to make representation in writing to both the Governor and an Advisory Committee.

The Advisory Committee was to consist of persons nominated by the Governor, the Chairman being a person who held or had held high judicial office and was to meet in camera; it was the duty of the Chairman of the Committee to advise the detainee of the grounds of the detention order made against him. The safeguards thus provided for the detainee corresponded closely to those provided by Defence Regulation 18B of

the United Kingdom during the last war. Although Regulation 52 authorised the Governor to delegate any of the powers conferred on him by the regulations, it would seem that the power of detention was not delegated.

However, the same Regulation 24 provided that any authorised officer may make a 28 day detention order, if he had reason to believe that there were grounds for detention under this Regulation. The Report of the Nyasaland Commission of Inquiry¹ under the Chairmanship of Mr. Justice Devlin (as he then was) pointed out that the Regulation did not say whether or not this sort of order was renewable by the authorised officer, but that nevertheless, "in some cases the period of 28 days had been repeated."²

By Regulation 26, it was provided that if a person, upon being questioned by an authorised officer of a member of Her Majesty's Forces, failed to satisfy the questioner as to his identity or as to the purpose for which he was in the place where he was found, the questioner reasonably suspecting that that person had acted in a manner prejudicial to the public safety or to the preservation of peace or was about to commit an offence against the Regulation, he could detain him pending

1. Cmd 814 (1959) The commission was set up to investigate allegation of abuse of use of the emergency powers (Henceforth referred to as Devlin Commission and Report).

2. Ibid p. 91.

inquiries. The period of detention under this Regulation could vary from 24 hours to seven days according to the status of the person making the arrest!

In their report, the Devlin Commission stated that they understood that by the middle of May, 1959, about 1,000 persons had been detained, most of them under the 28 days orders on suspicion of subversive behaviour.¹ In this connection the Commission gave evidence in support of their much publicised statement that Nyasaland was at the time a police state. They pointed out that from a number of African witnesses who were nervous of giving evidence before them, they gained the impression that it was unsafe for anyone in Nyasaland to criticise the policy of the Government.²

The Report pointed out that the Regulations made no provisions as to the manner of making arrests for the purposes of preventive detention.³ However, the Commission understood the view of the Government to be that the person making such an arrest was subject to the same obligations and had the same powers as if he were arresting for a crime. And it would appear from the Report that in several cases more force had been used than might have seemed strictly necessary in the

1. Cmd 814 (1959) p. 130.

2. Ibid. p. 91

3. Ibid. p. 92.

circumstances. In some cases, the person arrested was refused any reason for his arrest by those effecting it. The evidence of one special constable before the Commission concerning the arrest stated: "We were sent out to arrest him and that was our job; we did not have to tell him anything about why."¹ The Commission concluded: "We think that it is quite evident that unnecessary and illegal force was used in making a number of arrests".²

Another of the main Regulations was Regulation 46 which provided that:

"Any authorised officer, police officer or member of Her Majesty's Forces or any person acting under the direction of such officer or member of Her Majesty's Forces may if he suspects that any evidence of the commission of an offence against these Regulations or against the provisions of the Penal Code or any other law is likely to be found...

(a) enter and search any premises (b) search any vessel, aircraft, train or vehicle or individual whether in a public place or not, and may seize anything found therein or on such individual as the case may be."

This Regulation was extensively used to round up members of the Nyasaland National Congress Party which on March, 3, 1959 became an unlawful society under section 70 of the Penal Code,

1. Ibid. p. 95.

2. Ibid. p. 126.

and the membership of which therefore, became an offence under the ordinary law as from that date - an example of the combined use of powers given both by the ordinary law and by emergency law to deal with an emergency situation. The searches which took place under this Regulation frequently led to confiscation of implements without any arrangement being made for their return or payment of compensation. For a man whose annual income was about £20, £3 of which may have gone in poll tax, the loss of an implement such as an axe or chopper was a very serious matter and caused considerable hardship.

In addition to being used for purposes of effecting preventive detention and arrest for an offence under the Penal Code, Regulation 46 was also used in connection with Regulations 26 and 11 for the purpose, according to the Devlin Commission,¹ of imposing a form of collective punishment upon troublesome villages. Regulation 26 has already been discussed.

Regulation 11 provided:

(1) If as respects any area, it appears to the Governor or a Provincial Commissioner to be necessary or expedient that special precautions should be taken to prevent malicious injury to person or property, he may by order declare such an area to be a special area for the purpose of these Regulations.

1. Cmd. 814 (1959) pp. 136 - 137.

(2) It shall be the duty of any person in a special area to stop and submit to search by a competent authority when called upon to do so, and if any person fails to stop when challenged or called upon to stop by a competent authority he shall be guilty of an offence and may be arrested by any competent authority without warrant.

(3) It shall be lawful for any competent authority in order (a) to effect an arrest under sub-regulation 2; or (b) to overcome forcible resistance offered by any person to such arrest; or (c) to prevent the escape from arrest or the rescue of any person arrested as aforesaid, to use such force as, in the circumstances of the case, may be reasonably necessary, which force may extend to the use of lethal weapons."

On March 9, 1959, special areas were declared under this Regulation ostensibly for the purpose of dealing with the problem created by the erection of road blocks. The Devlin Commission pointed out that it was only too easy for persons to emerge from hiding at the sides of roads for the purpose of re-erecting dismantled road blocks and run away at the approach of security forces. "Under the ordinary law", the Report of the Commission stated¹, "force can be used to restrain a person once he had been arrested; this Regulation makes it clear that force, including lethal force, can be used in order to effect the arrest."¹

1. Cmdd 814 (1959) pp. 131 - 2.

In addition, Regulation 15 empowered any member of Her Majesty's Forces or any police officer to require any person to remove any barricade from a road, and Regulation 40 empowered any person upon whom powers were conferred by those Regulations to use all force reasonably necessary for the exercise of the power.

It is not surprising, therefore, to find that Reg. 11 was in fact not used for the purpose of dealing with trouble at road blocks, for which purpose it appeared to have been unnecessary, but had been used instead, according to the Devlin Commission for the purpose of cordonning and searching villages.¹ An area would be declared a special area under Reg. 11, a search would take place under Reg. 46 and persons would then be detained pending inquiries under Reg. 26. The ostensible purpose would be to search for wanted men and evidence against them, but as already pointed out, the Devlin Commission regarded it as hardly more than incidental to the main purpose of the operation, the imposition of a form of collective punishment upon troublesome villages. The Report states: "They were punitive expeditions intended to make it plain that siding with congress led to very unpleasant consequences".²

Whilst Regulations 11, 26 and 46 were apparently used for the purpose of collective punishment, although they were not intended for that purpose, the Regulation specifically

1. Cmd. 814 (1959) p. 132.

2. Ibid. at p. 137.

authorising collective punishment was ~~strongly~~ enough, according to the Devlin Commission, not used for that purpose, but for the purpose only of obtaining compensation for damage done.

The relevant Regulation was Reg. 67, which provided;

"Where it appears to a District Commissioner with respect to any area comprised within his District that (a) a crime has been committed the inhabitants have failed to take reasonable steps to prevent the commission of the offence or to prevent the escape of the offender or (b) the inhabitants or a substantial number of them, are members of or are or have recently been active in the furtherance of the objects of an unlawful society, or have recently consorted with or harboured any members of any such society, the District Commissioner may, with the approval of the Provincial Commissioner, impose fines on all or any of the inhabitants of the area."¹

As the Devlin Commission pointed out,² this Regulation conferred a discretion which was wide enough on the District Commissioner to enable him to impose a fine practically wherever he wanted in view of the fact that the Regulation only required it to appear to the District Commissioner that a substantial number of the inhabitants were members of that organisation. Furthermore, there was no limit to the amount of fine which could be imposed under the Regulation. The Devlin Commission concluded that, in fact, the power had rarely been abused.

1. Similar provision was made in Kenya during the Mau Mau Emergency of 1952 - See Reg. 4A of the Emergency Reg. 1952.

2. Ibid. p. 138.

Nevertheless, the fines collected in Nyasaland amounted to a little over £30,000. When it is borne in mind that thirty shillings (30/-) was the average monthly wage for an African in Nyasaland at that time, and that the same sum was also the amount of the annual poll tax, it will be appreciated that the collective fine might be a not inconsiderable burden on one who might in fact be innocent. Perhaps it is just as well that the measures was only temporary in view of the abuse inherent in such a provision.

The method of enforcing payment of collective fine also appears to be questionable. The Regulation provided for enforcement of payment by imprisonment following conviction in a subordinate court or any seizure of property by order of the District Commissioner. The Devlin Report stated that¹, in fact, payment seemed to have been secured in some instances by a threat of reprisals in the event of non-payment. One instance was cited in which the notification of fine stated :

"Between April 6 and April 9 security forces will operate throughout the area in order to apply the necessary pressure on all people to pay."

The Regulations considered are but a small part of the whole. They appear, however, to be the Regulations which were primarily used by the authorities to cope with the emergency declared in

1. Cmdnd 814 (1959) p. 139.

Nyasaland and appear also to be the most controversial in the discretions and wide powers which they confer on the Executive. Other Regulations conferred wider powers to control meetings, processions, publications and other similar matters which whilst not being unimportant, appear largely to have duplicated powers given by ordinary laws and appear not to have caused any great controversy.

Obviously in an emergency situation, assuming the emergency to be justified, discretionary powers must be given to the executive, "a war cannot be fought on the principles of Magna Carta,"¹ but there is danger in regarding every threat to constituted authority, or genuine opposition to government policy as a war to be dealt with ruthlessly.

Whether the discretionary power given by any of the emergency regulations in the case of Nyasaland are wider than necessary for the purpose of dealing with the situation which existed at the time is largely a political question. In view of the fact, however, that there was adequate evidence of abuse, and the fact that they were more directed at wiping out any resistance or threat of resistance to government policy, one must conclude that some of the measures would seem to have been unnecessary and inexpedient.

1. Cf. Liversidge v. Anderson (1942) A.C. 206

THE KENYA 'MAU-MAU' EMERGENCY

To avoid a facile explanation of the events which led to the emergency in Kenya, it is necessary to recall the tragic land hunger and the denial of elementary rights to the Kenya African which provides the background of the setting. Seldom in world history had two nations faced each other on such basis of inequality as was to be found in the colony. For some thirty years before the crisis, the Kenya African, in the face of the bitterest settler opposition, had gradually succeeded in evolving a democratic constitutional challenge to the settler system. In the post-war years this challenge was embodied in the Kenya African Union, which provided the broad mental climate of African nationalism. Though an unequivocally democratic organisation wedded to constitutional methods, the African Union was inevitably in open disagreement with the coersions of the settler system, and opposed to the autocratic nature of the Kenya Government, which often regarded as undemocratic political action which in Britain was and has been regarded as basic to the democratic way of life.

The origin of the Mau Mau crisis or emergency would seem to be attributable to the deteriorating relations between the two nations which had been intensified by the decline of Imperial control during the war. On the one hand the Africans were

growing increasingly restive despite the small gains they had already achieved in the post-war world. On the other hand, there were settlers who regarded every African political movement with disfavour, and confused non-political and ordinary crimes with exaggerated reports of various groups of African nationalists which from time to time had advocated violent means to solving the crying land hunger of the country and to win some measure of freedom for the African. There was reputed to have been a number of such societies in Kenya history; though they had never proved in any real sense a challenge to European rule, these groups evoked anxious interest in European circles. Warnings of a secret-semi-pagan organisation of ruthless terrorists such as Mau Mau¹ was passed to the government. In early 1950, there was an outbreak of violence by a religious sect. This was attributed to the Mau Mau to which was also attributed later outbreaks of arson. The Mau Mau was, therefore, declared an unlawful society by an Order-in-Council, 1950.

-
1. There are several theories as to the origin of the name and the society itself. There are those who maintain that Mau Mau has never amounted to a society in the proper incoming of the word, See e.g. West Africa Sept. 19, 1953, p. S74 where in a review of Colin Wills Who killed Kenya? the reviewer states: "He speaks of the Mau Mau Society. There is still no evidence of such a society, still no evidence of any unifying force behind it other than the oath. The separate bands who now operate under the name certainly have no high command or even much contact with each other. To describe the whole movement as the work of a society is thoroughly misleading.

For some time before the final declaration of emergency the settlers had been focusing attention on "Mau Mau Outrages" and urging the need for strong measures to combat the "crime wave" though there was no statistics to justify that crimes of violence were increasing at a rate higher than in any of Kenya's neighbouring countries of Uganda and Tanganyika. The settlers, however, paid great attention to such incidents as occurred, for ¹, the "Mau Mau" was "pledged to drive the white man out of Africa." There are some who have suggested that the campaign against the Mau Mau was used as an opportunity of smashing the growing strength of African disaffection without provoking too much opposition from home (Britain) where liberal public opinion would have been shocked by a frontal attack on the Kenya African Union, whose huge membership, democratic ideals and constitutional methods had given it a certain immunity from repression.¹

On July 10th, 1952, the settlers moved a motion in the Legislative Council urging the Government "to take the measures necessary to improve the situation". The situation being "outrages" killing of cattle etc "described in detail by the settler Press, thereby conjuring up the spectre of Mau Mau. On August 24th, 1952, after consultation with the Colonial Secretary, the Kenya Government issued a statement asserting that "certain African leaders had declared at public meetings

1. See R. Parkhurst KENYA : A history of two nations. p. 85.

that nothing would satisfy the African people of Kenya except self-government and the eviction of the other races from the Colony." Though in Britain this would have been regarded as a legitimate expression of opinion, in Kenya it was, of course, equated with treason. The Government declared that it would not tolerate disaffection, and in conformity with this declaration curfews were imposed between August 21st and September 16th, in four areas of the Kukuyu Reserve, and after September 23rd on travel in and out of Nairobi; on September 25th, in face of the opposition of the African members, eight emergency Bills were introduced in the Legislative Council, controlling the Press, providing for compulsory registration of societies with ten or more members, and giving the police power to make arrest without warrant and to seize and destroy publications issued without licence.

On the day following the introduction of these Bills, several European farms were attacked by African gangs armed with knives and spears; two African headmen (perhaps considered disloyal to the African cause) were assassinated. During the next few days there were a number of other incidents, and on September 29th a gang of Africans succeeded in breaking into a European farm. The next day, the African unofficial members of the Legislative Council issued a statement declaring that

•

these incidents were the work of "a localised organisation of a few irresponsible gangs", but were being used by the settlers who had embarked on "a campaign of misrepresentation by grossly exaggerating the extent of crime and subversive activities." They complained that the emergency legislation would strengthen the position of the European as against the African, and appealed for a Royal Commission to investigate the "exaggerated unrest."

From its inception the emergency legislation acted as a stimulus to disorder. Attacks on European farms continued, firearms began to be stolen, and Kukuyus suspected of being unpatriotic were attacked.

On October 20th, a date which, as the Colonial Secretary explained, was chosen "to coincide" with the arrival of British reinforcements, a State of Emergency was declared. Repression at once assumed enormous proportions. The Emergency Regulation, 1952,¹ a main Regulation which was amended, by additions, no fewer than five times,² was passed. Nearly all the most important leaders of the Kenya African Union, the African Trade Unions, the Independent Schools, and other African Organisations were arrested and detained under Regulation 2(1) which provided that "whenever the Governor is satisfied that, for the purpose of maintaining public order, it is necessary to

1. G.N. No. 1103 of 1952.

2. G.N. No. 1154, 1253, 1307, 1346 and 1348 of 1952.

exercise control over any person, the Governor may make an Order (hereinafter called a detention Order) against any person directing that he be detained, and thereupon such person shall be arrested and detained." Furthermore by sub-section 6 of the same regulation "Any police officer not below the rank of Assistant Inspector may without warrant arrest any person in respect of whom he has reason to believe that there are grounds which would justify his detention under this regulation; any such persons may be detained for a period not exceeding twenty-eight days pending a decision as to whether a detention order should be made against him." Thus a person can be arrested and detained by a police officer for as long as twenty-eight days without any charge being made or brought against him.

The wholesale arrest of responsible African leaders led to panic and confusion, which necessarily placed policies of moderation and responsible action "at a discount whilst opening the field to any advocate of more drastic policies. Mr. Mathew, leader of the nominated members in the Legislative Council, openly complained that he and his colleagues had been placed in "political storage." Being forbidden to talk to more than three persons at a time, it was quite impossible for him and his colleagues to influence the masses against violence. Socially, the crisis increased the poverty of the African, strained the already frayed relations between the races well

beyond breaking point, and still further lowered the prestige of the Administration.

Africans were rounded up in increasing numbers;¹ they were detained for "screening", were evicted from their lands and had their fields confiscated whenever it was suspected that villagers were withholding information from the authorities. To this extent, Regulation 4A² which provided both for corporal punishment and collective punishment was extensively used.

It provides:

"4A(1) Where it appears to a District Officer with respect to any area (hereinafter referred to as the affected area) forming part of the Native Lands, as defined in the Native Lands Trust Ordinance (Cap. 100) and comprised within his district ----

(a) that any crime as defined by sub-regulation has been committed and that the inhabitants of the affected area have failed to take reasonable steps to prevent the commission of the crime or to prevent the escape of any person who, they had reasonable cause to believe, committed the crime; or

(b) that the inhabitants, or a substantial number of the inhabitants, of the affected area are numbers of, or are or have recently been active in the furtherance of the objects

-
1. Official figures recrod that by Nov. 15, 1952, 8,500 Africans had been arrested; a further 31,450 had been "screened".
 2. Emergency (Amendment)(No.3) Regulations, 1952 GN No.1253.

of, any unlawful society, or have recently consorted with or harboured any member of such a society, it shall be lawful for such District Officer to take all or any of the following action

- (i) to seize any cattle or vehicle, as defined in sub-regulation (7) of this regulation, for the time being within the affected area;
- (ii) to make an order directing that all, or any specified shops, markets or trading centres within a radius of three miles, or such greater distance as the Chief Native Commissioner may approve, of a specified point within the affected area, shall be and remain closed for a specified period or periods not exceeding, in the aggregate fourteen days;
- (iii) to make an Order directing that all or any dwelling in the affected area be closed and kept closed and unavailable for human habitation for such period or periods not exceeding in the aggregate fourteen days, as may be specified.

2. Every seizure under this regulation, and the facts and circumstances relating thereto, shall be reported as soon as possible to the Governor who may direct such inquiry into those facts and circumstances and require such further report thereon as he considers adequate to enable him to exercise the powers conferred by sub-regulation (3) of this regulation.

(3) Upon receiving such report or further report, as the case may be, the Governor may make one or the other of the following Orders:-

- (a) an Order directing that the cattle or vehicles so seized shall be released;
- (b) an Order directing that the cattle or vehicles so seized or such proportion or part thereof as may be specified in the Order, be forfeited to the Government.

On November 20th, 1952, the Government announced that immediate retribution in the form of seizure of livestock and bicycles would be carried out against any African Community which failed to collaborate with the Police. Peasants were liable to have their crops confiscated if they allowed crime to occur in the vicinity of any European farm or State forest. When four cattle were killed and three injured by slashing on a European farm near Nyeri, all the male labourers were arrested and their cattle seized. When two settlers were killed on a neighbouring farm, an area of several hundred square miles was declared a prohibited area, the Kukuyu families being moved to special camps "as a temporary measure". On January 6th, General Sir Bryan Robertson flew to Nairobi for the opening of "operation Blitz". Prior to the operation all labourers were cleared from a forest at the northern end of the Aberdare mountains. No huts were permitted within 50 yards of the forest. In one operation a hundred were burnt

down "to deny shelter to the outlaw gangs," despite the "considerable danger of setting fire to the forest, which was very dry." On January 21st, the Colonial Secretary admitted in the House of Commons that 4,471 Kukuyu squatters including men, women and children, had been evicted from European farms or crown forests in the Rift Valley Province. A total of 944 cattle, 10,577 sheep and goats, 70 donkeys, 57 bicycles, 1 automobile and one motor car had been forfeited by persons evicted.¹

Three hundred cattle and sheep were rounded up in Gatundu area of Kiambu in February when it was suspected that the villagers were withholding information. In the nightmare world, it was not surprising that whole African villages fled to the hills at the approach of white troops or at the sound of the circling war plane; it was not unlikely that the powers that be, would often equate flight with guilt, view the fugitives as Mau Mau bands and take action without further inquiry. The East African Standard² openly reported that "authorised officers" might shoot whenever "a suspect failed to stop when challenged. The Emergency Regulations gave power of life and death. The New York Times³ correspondent in Nairobi declared that "it is hardly denied here that a certain number of persons have been killed in one way or another who almost certainly were not Mau Mau. There is a tendency to shoot down any women heading towards the forest."

1. Hansard Vol. 505

2. See Parkhurst: Kenya - A history of two nations p. 96.

3. Aug. 19, 1953.

A British soldier serving in Kenya wrote: "Prisoners are often brutally treated, many are shot and none are fed. Apparently the Government makes no provision for feeding prisoners."¹

There were complaints that during the Emergency it was common for arrested men to be ordered out of the lorry ostensibly conveying them to a detention camp and told to go, but after walking a few yards they would be shot in the back. Such allegations were seldom subjected to the search light of legal investigation. One case of murder was, however, tried by Court Martial in Nairobi on November 24th - 27th 1953² and widely reported in the Press.

Captain G.S.L. Griffiths was charged with the murder of an African forestry worker named Ndegwa. The prosecution alleged that a Company-Sergeant-Major William Llewellyn had asked Griffiths what were his orders concerning shooting on the road where he was to establish a road block. "The answer he got was that he could shoot anybody he liked, Public Works Department or anyone, providing they were black,". The prosecution also told that Griffiths' company was going to Malaya soon and that Griffiths wished to increase the Company's score of killing to 50. Colonel Parker, Assistant Director of Army Legal Services, continued that shortly afterwards three

1. The African and Colonial World, No. 1. p. 10.

2. The Times Nov. 29 - 30, 1953. See also Manchester Guardian 30/11/53. The case of Captain Griffiths.

African civilians had been stopped at Sergeant-Major Llewellyn's post. Griffiths, then a major arrived in a jeep with a Bren-gun on a swivel mounting. Griffiths, who appeared to be in a great rage, asked why the Sergeant-Major had not killed them. He examined the passes of the three Africans, and told the oldest to walk to the rear of the jeep and the other two to walk forward. The prosecution went on: "When they got ten yards ahead of the jeep, Griffiths cocked the Bren-gun and discharged a burst into their backs and practically blew out their stomachs."

Llewellyn confirmed in evidence that the men were shot by Griffiths. There was "tremendous rivalry" between that of the King's African Rifles for the highest score of Mau Mau killed and some company commanders were offering 5/- and 10/- a head for every one killed. The accused, Captain Griffiths, admitted that he had given men in his command rewards of 5/- a head for killing alleged terrorists, but denied that he deliberately shot the Africans. He alleged that he shot them after they had refused his order to halt. The accused was acquitted of murder, but the fact remains that not only were men shot in the back on the very unsatisfactory excuse that they might escape despite the fact that it was admitted in evidence that they were sitting quietly by the roadside in the custody of two soldiers when the Captain came on the scene, but also that men could be nonchalantly killed to keep up the scores on

a "scoring board."

Amongst other repressive measures which were introduced pursuant to the emergency declaration ^{was} Regulation 12A(1) of the Emergency (Amendment) Regulations 1952.¹ It provides:

"Whenever the Member² is satisfied in regard to any School -

- (a) that any member of the management or teaching staff of the school, or person acting as such, is a person who is or had recently been associated with activities which are prejudicial to the maintenance of public order; or
- (b) that any teaching or instruction given or imparted in such school to any pupil attending the school is prejudicial to the maintenance of public order; or
- (c) that any pupil attending whether regularly or otherwise, enrolled, at the school is or has been recently associated with activities which are prejudicial as aforesaid; or
- (d) that the premises of the school or any part thereof, are or have recently been used for activities which are prejudicial as aforesaid; he may, by order, direct that the school be closed."

Following a declaration by the Provincial Commissioner for the Central Province that some Kenya Independent Schools were "inefficient, of evil influence, and the chief breeding ground

1. G. N. No. 1150

2. Reg. 12A(7) 'Member' means the Member of the Executive Council of the Colony for the time being responsible for Education.

of the Mau Mau Movement," the Government began the systematic closing down of the Independent schools and the persecution of the African Orthodox Church. In the months which followed, 135 schools were closed in the Central Province, about 100 in the Rift Valley Province, and another 100 in the Nyeri, Fort Hall and Kiambu districts in the Meni and Embu areas. The important Teachers Training School was also closed. The attitude of the Kenya African who saw the destruction of the schools which had taken so much effort to establish and which constituted their children's hope for the future may be deduced from a Government report that Nyeri tribesmen were "sullen" and were boycotting the mission schools, which were in any case too few to accommodate all the children and usually too far to travel, if they were allowed. Thus, not only the father could be punished for his alleged sin, but the alleged sin could also be visited on the children.

Like Nyasaland, which has been discussed already, the extent to which the emergency in Kenya, gave rise to extensive repressive use of emergency powers, was formidable. The collective punishment regulations of both countries, in particular, and other regulations in general, can only be justified by evidence of absolute necessity. The power of collective punishment infringes the principles of law that it is better for one hundred guilty men to go unpunished than for one innocent man to suffer. Where emergency is proved to

be necessary in the circumstances, it is clearly a remedy that should have been applied with care because of its obvious potentialities for alienating the sympathies of those whose co-operation is essential.

The colonial Secretary at the time said of Kenya that "The declaration of emergency has enabled the Kenya Government to detain the ringleaders and their lieutenants, about 130 altogether. The prisoners will be screened and some may be released when the tension is over."¹ However, the arrest of the alleged leaders did not cause the collapse of the Mau Mau Movement, as was apparently expected, and the emergency which was thought would last only a few months in fact lasted for almost eight years.

It has been shown that the colonial government used emergency powers in a large measure to prevent and control subversive elements within the country. Political disaffection and activity which erupted into violence both in Nyasaland and Kenya led the administrators to tighten rather than relax their grip, even if eventually the grip was relaxed. Most of the newly independent African States within the Commonwealth have used emergency powers primarily for the same reasons, as we shall now indicate. It has already been pointed out that some of the countries, in enacting emergency legislation have substantially

1. Hansard Vol. 505 Cols. 865 - 866.

re-enacted the Emergency Powers Orders-in-Council 1939 - 1956, whilst some have actually retained the latter as part of their law.

The year 1960 was the great year of African independence, though the graduation had begun a few years earlier in 1958. By the end of the decade, virtually the whole continent between the Meditterranean and the Zambezi was no longer subject to overt political control from outside. The first step after independence was for the new rulers to consolidate their power. Beset by economic and social problems to which solutions must be found, the new rulers must do what they can with what they have at hand. Political activity can still erupt into violence at a moment's notice and as a result the governments have been disposed to tighten rather than relax their grip.

All new African Governments are faced with the problem of building nations within the arbitrarily drawn geographical frontiers that they have inherited from the colonial masters. Besides, the people of newly independent nations often have unnecessarily high hopes and expectations and they are apt to be quickly dissillusioned with the first fruits of independence. Also, it is difficult to fight the enemies of poverty, ignorance and disease according to the Westminster

rules. For these reasons and more it would seem therefore, that the situation and circumstances which justified the Colonial "Masters" in providing for and using emergency power still exists in a different form and content in the newly "weaned" babies of the "Mother-Country". The babies had been taught that the effective method by which they could deal with organised opposition to constituted authority, insurrection, threatened and actual subversion, is by the use of wide discretionary power pursuant to a declaration of emergency, whether such emergency actually exists must be of secondary concern, and alternative methods of dealing with the situation should not worry their minds. The lesson would seem to have been well taken, as will be seen from the use which has been made of emergency powers in these States after independence.

POST-INDEPENDENCE

NIGERIAN FEDERALISM.

In a Federal Government¹ such as Nigeria, any exercise of the emergency powers of the Federal Government is bound to correspond to a domination of the powers by the central government of the regional governments. As Professor Wheare pointed out:²

-
1. To date Nigeria is the only Federation within the Commonwealth in Africa.
 2. Wheare: Federal Government 3rd Edn) p. 197.

"The working of Federal Government in a wartime (or emergency) would seem likely to exhibit in extreme form the peculiar problems which a federal system produces. For, while it is the essence of federalism to be pluralistic, it is the essence of the war power to the unitary, to be centralised and regimented, to be, in the modern word "totalitarian".

There is an immediate contrast between the multiplicity of federalism with its division of authority, and the unity necessary if war is to be conducted efficiently.*

A totalitarian government may handle emergency situations without embarrassment. But the apparent necessities evoked by danger often conflict gravely with the postulates of constitutional democracy.¹

Nigeria is a federal realm of the Commonwealth. On attaining independence in 1960, it did so as a federation of three units called Regions - the Northern, Western and Eastern together with a small federal territory - Lagos - containing the seat of the federal authority. Nigeria became a Republic within the Commonwealth on 1st October, 1963 and by this time a fourth Region had been created, the Mid-Western. On May 30, 1967,² it became a Republic with twelve states, still within the Commonwealth.

-
1. See Harry Groves: "Emergency Powers," Journal of International Commission of Jurists (1961) Vol.III p. I.
 2. See Suspension of Constitution (Amendment) Decree D.No.33 As there has been no new constitution, it is proposed to discuss Nigeria under the 1963 Constitution.

The 1963 Federal Constitution preserved the same basic federal structure as that established in 1960, but the former has some important innovations in detail, including of necessity provisions as to the election and powers of the President. Most 1963 sections corresponding to 1960 sections are identical, and most of the differences are formal ones caused by the replacement of the Queen by the President. This rough and brief guide has been necessitated by the fact that the emergency in Nigeria, which is to be discussed was proclaimed before the Republican Constitution.

The system is "truly federal". Each Governmental unit is fully equipped to carry out its function in a substantially autonomous way, and even the fiscal arrangements have been designed as in Malaya and West Germany, to give the Regions (States) some financial independence, though as in all modern federations the central authority is acquiring a dominant financial position. Express legislative powers are vested in the federal Parliament, some exclusive and some concurrent, and the undefined residue of power is vested in the (Regions) States. The result is to give the centre more powers than are possessed by the centre in Australia and Canada, but fewer than are possessed by the Centre in Malaysia and India.

There is an elaborate set of fundamental guarantees.¹ The Constitution to a considerable extent spells out and for the rest implies British style responsible cabinet government, with its mingling of executive and legislative functions. Judicial power is separated, Judges are given a high degree of independence and - unusual even in written constitutions - are expressly required to be qualified Lawyers.² There is a central Supreme Court and separate Regional (State) and Territory Courts.

The Nigerian Constitution is evidently the result of adapting to local circumstances general principles and probably particular sections taken from many federal models.³ It has been suggested⁴ that probably Malaya (as it then was) was the biggest single influence, and that it was the Chief source for the provision with which this study is concerned - the emergency power - which reads - Section 70(1) in the Republican Constitution, 1963, and Sec. 65(1) of the Old 1960 Constitution:

"Parliament may at any time make such laws for Nigeria or any part thereof with respect to matters not included in the Legislative list as may appear to Parliament to be necessary or expedient for the purpose of maintaining or securing peace, order and good government during any period of emergency."

-
1. Chapter III
 2. Chapter VIII
 3. E.g. U.S.A., Canada, Australia, India and Malaya (as it then was)
 4. See Geoffrey Sawyer "Emergency Powers in Nigeria and Malayan Federalism" in Malaya Law Review Vol.6, No. 1, p. 83 at p. 84-5.

Sub-Section (2) confines the operation of such laws to the emergency period, and sub-section (3) defines "period of emergency" as being a period during which

- "(a) the Federation is at war.
- (b) there is in force a resolution passed by each House of Parliament declaring that a state of public emergency exists; or
- (c) there is in force a resolution of each House of Parliament supported by the votes of not less than two-thirds of all members of the House declaring that democratic institutions in Nigeria are threatened by subversion."

If, as has been suggested, the general plan of these provisions is taken from the original Malayan Section 150, in particular the form of the extension of federal powers - adding matters otherwise within ^{regional} ~~State~~ power - then it is surprising that the Nigerian provisions were not amended when the Malayan Constitution of 1963, section 150 has been amended so that the method of extending federal power in an emergency by reference to residual powers no longer appears; instead, Parliament is then given power to make laws, "with respect to any matter." That the Nigerian provisions remain ~~un~~unamended is even more surprising in view of the argument put to the Supreme Court in Williams v. Majekodunmi,¹ that the only "emergency power" laws, capable of over-riding relevant fundamental guarantees, which Parliament could make were those otherwise solely within Regional

1. (1962) 1 All N. L. R. 324.

Power; in so far as Parliament made laws during an emergency which it could make in any event, these would be subject to all the fundamental guarantees. The Court in Williams v. Maje-kodunmi¹ did not have to determine this question, and refrained from doing so.

On May 20, 1962, the Nigerian Federal Parliament carried in both Houses a resolution:

"That in pursuance of section 65 of the Constitution of the Federation, it is declared that a state of public emergency exists and this resolution shall remain in force until the end of the month of December, 1963."

This was an exercise of the power in sub-section 3(b) of the 1960 Constitution. As the form of Sec.65 of the 1960 Constitution had allowed, Parliament had previously enacted an emergency Powers Act, 1961, already mentioned³ which now came into operation. The Federal Parliament resorted to emergency powers in order to deal with disturbances in the Western Region which was caused mainly by political disagreement between two leaders of the Western - based Action Group Party.⁴

1. (Ibid). (1962) 1 All N. L. R. 324.

2. Now Section 70(3)(b) it is difficult to see why both (b) and (c) of this section should have been retained, since a threat from subversion would also constitute a state of public emergency, no greater powers attend a declaration of emergency on the subversion ground, and the latter requires a two-thirds majority while the former requires a simple majority.

3. See Chapter 2.

4. The following historical detail is derived from O. I. Odumusu, Nigerian Constitution, (1963) J.P. Mackintosh, "Federalism in Nigeria" in (1962) 10 Political Studies p. 223.

Until February 1962, each Region had been under the preponderant control of one political party - in the East, the National Council of Nigerian Citizens (N.C.N.C.); in the North, the Northern People's Congress (N.P.C.); and in the West, the Action Group (A.G.). Each Region also elected a preponderance of members of the regional majority party to the Federal Parliament, while the Northern N.P.C. and the Eastern N.C.N.C. had since 1959 been allies in support of a coalition government under the late Prime Minister Sir Abubakar Tafawa Balewa (N.P.C.); the A. G. accordingly formed the Opposition. In the North and East, the tendency had been for the most powerful political leaders to remain in the regional sphere and to leave federal matters to senior members of the respective groups. Thus, in the predominantly Hausa North, the most powerful local leader Sir Ahmadu Bello, the late Sark of Sokoto, a ruler of immense local prestige, was the Premier. The predominantly Ibo Eastern Region had thrust the office on Dr. M. I. Okpara, because Dr. Nnamdi Azikiwe, the most important leader of the N.C.N.C. had chosen to become the Governor-General on the achievement of independence. The main offices in the Federal Government were inevitably divided between the N.P.C. and N.C.N.C.

This caused a good deal of bitterness in the Western based A.G. whose members had taken a leading part in the struggle for independence. Chief Obafemi Awolowo, the party leader and its most influential personality chose to transfer to Federal sphere, leaving his Deputy Chief S. L. Akintola, as Western Region Premier. But Chief Awolowo continued to behave in many ways as if he were the Regional Premier, determining regional party policy and endeavouring to determine matters of detailed administration in Western Region Government. Thus tension arose and increased not only because Chief Awolowo refused to follow the usual pattern of sending the Deputy to the Federal Parliament but also having preferred to go there himself, he still wanted to remain the dominant figure in the Region.

The tension between the Federal Government and Opposition became tension between the Federal Government and the Western Region and was carried into most fields of political dispute, including foreign and economic policy.¹ However, while Chief Awolowo and many of A.G. leaders played the game of an all-out opposition to the Federal Government with increasing zest, Chief Akintola, who had the responsibility of actually running the Western Region, played it decreasing so. It has been suggested by the pro-Akintola group that he probably did so because he was conscious of the need to cultivate good relations

1. One expression of the tension was the occurrence threat of extensive litigation between the Region and the Federal Government. See e.g. Balewa v. Doherty (1963) 1. W.L.R. 949.

with Federal Ministries if the Western Region was to obtain its fair share of the external aid which was being channelled through the Federal Government. But such good relations appeared to other A.G. leaders as treachery to the party and was regarded as a deliberate and personal plan of Akintola's to entrench himself and supercede the leader of the party. Hence feeling between Awolowo and Akintola became increasingly strained in the late 1961 and early 1962. Perhaps the Federal Government or some eminent members of it, no more tolerant of systematic opposition than other new African governments, happily encouraged this development.

In February 1962, the A. G. split into two groups. A majority group following the lead of Awolowo and a minority group following the lead of Akintola. Several unsuccessful attempts at reconciliation were made including one by the Governor of the Western Region, who was also a traditional ruler (the Oni of Ife) and a leading member of the A. G. Ultimately, on 21st May, the Governor made an Order removing Akintola from the Premiership and appointing Chief D.S. Adegbenro, an Awolowo follower, in his place. The Governor did this on petition from a majority of the members of the Regional House of Assembly, the legislature not then being in session. He had acted under Section 33(10) of the Western Region Constitution as it then stood, which empowered him to

remove the Premier who "no longer commands the support of a majority of the members of the House of Assembly." Chief Akintola immediately challenged this and commenced proceedings in the High Court.¹ Meanwhile, however, Adegbenro formed a government and took over the running of the Regional Government, though it is doubtful whether he secured the support of the permanent civil service and of the people.

Perhaps it would have been wiser if the Governor had called the House of Assembly into session in the first place to vote Akintola out, since he could hardly maintain his objection if a majority of the legislature supported Adegbenro. When the House of Assembly met on 25th May, and a motion of confidence in the Adegbenro Government was moved, it is believed that some followers of Akintola immediately started a violent demonstration, which ended only after police cleared the House. The Governor and Adegbenro urgently approached the Federal Government for police protection² to enable the House to meet later on the same day to pass the necessary resolution. But the Prime Minister, the late Sir Tafawa Balewa announced that while he acknowledged an obligation to

1. Akintola v. Adegbenro (1962) W.N.L.R. 185 (1963)
3 W.L.R. 63 (1963) A.C.614 Privy Council.

2. Each Region in Nigeria controlled some police but the Principal police force and the only one capable of firm and efficient action in this kind of situation was the federally controlled force.

maintain the public peace in Ibadan (the capital of the Western Region and seat of government) he would not regard as operative any resolution which the Regional House might adopt while dependent on police protection. This was an unfortunately extraordinary attitude to have adopted, as it offered a position of advantage to any minority group which chose by violence to prevent a regional legislature from carrying on its business. Inevitably when the House attempted to meet again, more disturbances were created. On May 29, the Federal Parliament ~~made~~ carried the declaration of emergency and on the same day about thirteen regulations¹ were rushed through Parliament made under the Emergency Powers Act, 1961, which conferred extensive regulation-making powers on the Governor-General-in-Council. These regulations concerned the detention of person, restriction of persons to specified areas - which was the only regulation extensively used - regulation of meeting and processions and similar familiar emergency provision. Here we are mainly concerned with the Emergency Powers (General) Regulations, 1962², regulations 4, 5, 6 and 7 whose contents were less usual in parts.

"4. - (1) Without prejudice to the provisions of the last foregoing regulation, the administrator shall be charged with the general function of administering the government of the emergency area and of exercising the executive

1. L. N. Nos. 54 - 66 of 1962.

2. L. N. 54 of 1962.

authority of the Region on behalf of Her Majesty.

(2) Subject to the provisions of Chapter III of the Constitution of the Federation (which relates to fundamental human rights), the administrator may do such things as appear to him necessary or expedient for the purpose of exercising his general function.

(3) The Prime Minister may give instructions to the administrator with respect to the exercise of the administrator's functions, and it shall be the duty of the administrator to comply with the directions.

5. - (1) Without prejudice to the generality of the powers conferred by paragraph (2) of the last foregoing regulation, the administrator (but not any other person appointed in pursuance of these regulations) may make such orders as appear to him to be necessary or expedient for the purpose of maintaining and securing peace, order and good government in the emergency area.

(2) Without prejudice to the generality of the powers conferred by the said paragraph (2) or the foregoing paragraph, any order under the foregoing paragraph may in particular, so far as it appears to the administrator to be necessary or expedient for the purpose mentioned in that paragraph - (a) make provision for the detention of persons (either within the emergency area or elsewhere) and the removal and exclusion of persons from the emergency area.

(3) Nothing in the foregoing provisions of this regulation shall authorise the making of provision for the trial of persons by Military Courts.

(4) An order under this regulation may provide that the order shall have effect for all purpose as if it were a law made by the Legislature of that Region.

(5) The Administrator shall, as soon as reasonably practicable after an order has been made under this regulation, transmit a copy of the order to the Prime Minister; and if the Prime Minister gives notice to the administrator that the Prime Minister disallows the order, it shall cease to have effect on the expiration of the day on which the notice is given, without prejudice to anything previously done thereunder.

(6) - (1) Subject to the provisions of sub-section (3) of section 99 of the Constitution of the Federation (which provides for the Prime Minister and certain other Ministers to give directions to the police with respect to public safety and order) and of any directions given in pursuance of that sub-section, the administrator (but^{not} any other person appointed in pursuance of these regulations) may give to the officer commanding the contingents of the Nigeria Police Force present in the emergency area such directions with respect to maintaining and securing of public safety and public order as the administrator considers expedient; and it shall be the duty of that officer to comply with the directions.

(2) All forces established under the Local Government Police Law of the Region or to which that Law applies shall be deemed to form part of the Nigeria Police Force;

(3)

(7) - (1) Except to such extent and during such period (if any) as the administrator may direct, no person holding or acting, or purporting to hold or act, in any of the offices

established for the Region and specified in the next following paragraph shall exercise any of the functions of that office.

(2) The Offices aforesaid are the office of Governor, Premier, and any other Minister of the Government of the Region, member of the Executive Council, Parliamentary Secretary, President or other officer or member of the House of Assembly, Superintendent-General of Local Government Police Forces, and any such other offices, if any, as the administrator may direct.

(3) It shall be the duty of all persons holding -

(a) offices in the public service of the Region within the meaning of the constitution of the Region; or

(b) offices ~~in~~ connected with any customary Court or Local Government authority established by law in the Region;

to exercise their functions in accordance with any directions given to them by the administrator; and without prejudice to the generality of the powers conferred on the administrator by virtue of these regulations, he may suspend from office any such person as aforesaid who in his opinion fails to comply with a direction given under this paragraph, and may appoint some other person to act in the place of the suspended person."

The Prime Minister appointed Dr. M. A. Majekodunmi, a member of the Senate and a member of the Cabinet as the Administrator. The Administrator proceeded to carry on the Government and in pursuance of the power granted him under the Emergency Powers (Restriction Orders) Regulation, 1962,¹ he

1. I. N. 65 of 1962.

served restriction orders against several persons including the Western Region Governor and Premier and Minister - which in practice made it impossible for the Western Region Government to carry on, because the persons concerned were confined to various places outside the capital and centre of government at Ibadan and could not have held cabinet meetings nor maintained effective contact with the civil service. Furthermore, officers in the Regional public service and Local Government Authorities were required to exercise their functions in accordance with the Administrator's directives who might suspend any recalcitrant officers. Objection has been taken of this "Hitleric" provision on the ground that it was virtually subversion of the federal nature of the Constitution by the Federal Parliament. Thus it has been said: "had a delegate from one of the Regions at the last Constitutional Conference been asked whether he intended the Federal Parliament ever to have power to suspend the most vital parts of a Regional Constitution, he would have given a decisively negative answer."¹

Surely this remark is uncalled for because any delegate would surely know that the provisions of Section 65 (now 70) of the Constitution were a "blank cheque" to the Central

1. Naish, "Some legal Aspects of the Emergency", The Lawyer (A University of Lagos Law Society Publication) April 1963 Vol.1, No. 1, p. 30.

Government to take over the administration of any of its units during an emergency. This agrees with the opinion of another writer on Nigerian Law.¹ He said:

"With respect, any delegate who read the provisions of section 70 (old 65) should reasonably have realised that when power was given to the Federal Parliament to act generally for peace, order and good government of a Region during an emergency, the Regional Legislature may temporarily be put out of action."

The question must, however, arise whether the situation at the material time justified a proclamation of emergency and the use of the drastic emergency powers. The official reason or justification given for the Federal Government action was that the government of the Western Region was paralysed, firstly because there were in existence two rival governments which claimed to be duly appointed, and secondly because it had been demonstrated that the Western Region Legislature could not sit without the occurrence of disturbances which made proceedings impossible. It was said that this state of civil war in the Regional Government was likely to be communicated to the people at large and so lead to a general break down of law and order. Some eye-witness²

-
1. Nwabueze, Constitutional Law of the Federal Republic of Nigeria (1964).
 2. See Naish, op.cit; Also Sawyer, op. cit, p. 90.

have cast considerable doubt on the fears expressed by the Federal Government. However, there is probably no doubt that if the Federal Government and its police had followed the course suggested by the objective consideration of what the West Germans call "federal good faith",¹ they would probably have prevented trouble and disturbances in the Western Legislature and the consequence would have established the rightful government.

It can be argued, as it was,² that only widespread rioting and unrest over much of a country, or as in this case, over much of a Region, can justify a declaration of emergency, that since the violence was confined to the precincts of the House of Assembly - the smashing of the chairs in the Chamber and the stabbing of a Minister - and there was calm and quiet in the whole of the Region, the situation did not warrant the declaration of emergency and the "Hitleric" use of emergency powers. But it is not only an actual, but also a potential, threat to the life of a State which should justify a declaration of emergency, and a Government would be failing in its duty if it allows an explosive and potentially dangerous situation to get out of hand before taking adequate measures to it.

1. See H. W. Bayer, Die Bundestrence (1961) pp. 23-45, 97-99 translation.

2. See Sawyer op. cit. p. 90. Also the argument in Adegbenro v. Attorney-General of the Federation & Ors (1962) 1 All N. L. R. 338.

Whether or not the emergency declaration in this instance was justified or not must remain a matter of opinion. The duration was probably unwarranted in view of the prevalent calm, but the resolution was never extended.

GHANA.

Limited use has also been made in Ghana of its Emergency Powers Act, 1961, for the reason that she has a Preventive Detention Act, which although conferring only one type of emergency power - the power of detention - yet has been found more useful to deal with alleged subversive activities.¹

However, the Emergency Powers Act was brought into operation about a few months after it was enacted in 1961. In September, 1961, following the "austerity budget", which increased taxation, introduced purchase tax and property tax and provided for the deduction from wages and salaries at source of income tax and an amount in respect of compulsory savings, there was a strike of railway and dock workers accompanied by civil disturbances centred at Takoradi, Ghana's leading port. The President was away at the time and the Presidential Commission felt that strict measures were needed to prevent any large scale insurrection and damage to the port which could paralyse the economy that the budget had sought to protect. The Presidential Commission declared

1. Bulletin of International Commission of Jurist No. 27 Sept., 1966 p. 24. In Feb. 1966, the Attorney-General when questioned about the number of detainees put the number at not less than 500, while other lawyers estimated the total as between 1,000 and 1,500.

state of emergency limited to Sekondi-Takoradi and all land in the country vested in the railways and harbours administration.¹ On the same day a comprehensive set of regulations was made.² These imposed heavy penalties for such acts as the publication of disturbing reports, incitement to disaffection, sabotage and looting. They gave power to control meetings and processions, the wearing of uniforms and emblems and the movement of traffic. They also authorised the requisitioning of property, the entry and search of premises, and the detention and removal of trouble makers.³ Various executive instruments were made under the ordinary law - an example of the combination of emergency legislation and the ordinary law to achieve the desired end. One imposed a curfew in Sekondi/Takoradi between 6 p.m. and 6 a.m. and the other restored the censorship of the Ashanti Pioneer newspaper which had been lifted only a few months previously.⁴ The state of emergency was revoked by the President on his return to Ghana after having been in force for nine days.

1. L.1 143.

2. Emergency Regulations, 1961 (L.I. 144).

3. It is interesting to observe that although, by virtue of S.3(3) of the Emergency Powers Act, the regulations only applied in the emergency area, their wording was entirely general.

4. L.1 155 and 156 of 1961.

Almost exactly a year after, the need was felt for the use of emergency powers following the assassination attempt on Dr. Nkrumah at Kulungugu in August, 1962, by a police officer. The vast popularity and overwhelming support which the President and the Convention Peoples Party of which he was leader had, had obviously decreased; it would appear that even the presence of the Preventive Detention Act, 1958, which had been extensively used as we shall discuss later, had not been sufficient to keep the populace in the state of mind at which they would be too afraid to oppose the President. The stringent and comprehensive set of regulations which had been made in 1961 was substantially re-enacted as the Emergency Regulations 1962,¹ the only addition being Regulation 2 which provides:

- "2(1) No person shall do any act or publish anything likely,
- (a) to be prejudicial to the public safety or the maintenance of public order;
 - (b) to bring into hatred or contempt, or to excite disaffection against, the Government as by law established;
 - (c) to undermine the authority of, or the public confidence in, the Government as by law established,
 - (d) to raise discontent or disaffection amongst the inhabitants of Ghana;
 - (e) to promote feelings of ill-will or hostility between different classes of the population of Ghana.

1. L. I. 215.

(2) Any person who commits an offence against this regulation shall be liable:

(a) on summary conviction, to imprisonment for term not exceeding one year or to a fine not exceeding one hundred pounds or both such imprisonment and fine; or

(b) on conviction on indictment, to imprisonment for a term not exceeding ten years or to a fine not exceeding one thousand pounds or to both such imprisonment and fine.

(3) For the purpose of this regulation, the word "publish" includes publication by means of words spoken and written, pictorial representations, grammophone records, cinema films and the sound tracks thereof. The effect of this provision read in conjunction with Regulation 1. - which prohibits publication of misleading reports - would seem to produce complete 'gagging' of all means of communications.

THE PREVENTIVE DETENTION ACT.

The Ghanaian Act¹ was originally expressed to be limited in duration but it remained in operation for eight years, even though it was limited to expire after five years, that is on 18th July, 1963.²

1. Preventive Detention Act, 1958 (No. 17).
2. It was in fact repealed by the National Liberation Council following the coup which overthrow Nkrumah regime in February 1966. See Preventive Detention (Repeal) Decree 1966. N.L.C. No. 30. However, not all the Nkrumah detainees were released. See Protective Custody Decree N.L.C. Decree No. 2 1966. The emphemistic title of the decree does not detract from the total surrender of personal liberty involved in the promulgation of the Decree.

During the passage of the Bill through Parliament, Government speakers said:

"the only person who need be alarmed about it are those who are either attempting to organise violence terrorism or civil war or who are acting as fifth columnists for some foreign power interested in subversion in Ghana the Bill has been deliberately drafted so that the Government can deal resolutely and without delay with any attempt to subvert the State by force. The Government are determined not to be caught unprepared, as a number of other states have been, by subversion either from within or without in order to preserve the due process of law, it may on occasion be unfortunately necessary to take special powers."¹

"The Government are seeking power to interfere with the rights of any citizen of Ghana, if that citizen is conducting himself in such a way as to interfere with the defence of Ghana, to interfere with the security of the State and with the relationship of foreign states in Ghana. The Members of the Opposition will concede the fact that it is at times necessary to adopt undemocratic methods to preserve democracy."²

The nature of the subversive acts feared by the Government was explained in considerable detail in a white Paper issued in 1959.³ The Act had not been brought into use immediately, but after some four months, in November, 1958, a detention

-
1. Dr. Kwame Nkrumah (Part Deb. Off. Report. 14th July, 1958.
 2. Minister of Local Government, Ibid. 15th July, 1958, Cols 513-514.
 3. W. P. No. 10/59.

order was made in respect of forty-three persons, In the following month a further order was made in respect of two prominent members of the Opposition, R. R. Amponsah and M. K. Apaloo, who had been unanimously found by an independent tribunal to have engaged in a conspiracy to carry out an act for an unlawful purpose revolutionary in character.¹ The white paper alleged that the persons detained in November were members of the secret societies respectively known as the Zenith Seven and the Tokyo Joes, which were plotting to overthrow the Government by violence and were linked with certain members of the opposition party.² After a detailed description of the ramifications of the alleged plot, with supporting evidence elicited by three public tribunals of enquiry, various criminal prosecutions and other means, the white paper concluded with the following summary of the circumstances which in the Governments view, justified the enactment and use of the Preventive Detention Act:

1. Report of the Granville Sharp Commission, Accra, 1959.

2. W. P. No. 10/59 cit p. 37.

"By no means every piece of evidence and information can be fitted into an exact place in an overall scheme. Broadly speaking, however, the overall plan is clear. It was to seek foreign support by allegations of corruption, known to those making them to be false, and to incite more violence in Ghana by circulating forged and false documents and rumours which would set one racial group against another. Money and material for revolutionary purposes were to be sought from abroad and the help of those fundamentally opposed to African independence enlisted. The plot was to be triggered off by the use of such persons as Benjamin Awhaitey,¹ whom it was thought could command Army support, or by the use of criminal elements such as were to be found among the "Tokyo Joes". The Prime Minister and other Ministers could then be assassinated without those who were in fact behind the assassination being revealed. When, in November, 1958, those associated with the first assassination plot were detained, R.R. Amponsah immediately declared that he and the Opposition generally were totally opposed to violence and the allegations made against the persons detained were a "frame-up" by the Government to get rid of their political opponents. At the very time he made this declaration, he was, as the Granville Sharp Commission has found, himself actively engaged in another plot to assassinate the Prime Minister."²

The White Paper gave four instances of the difficulty of relying on criminal prosecutions rather than preventive detention in combating subversive acts of this kind:

(1) One of the tribunals of enquiry investigated 491 alleged incidents of extortion, violence and intimidation in Ashanti. Efforts were made subsequently to institute prosecution in regard to these cases, but in fact, the lapse of time

1. Benjamin Awhaitey was tried before a Court-Martial.

2. W. P. No. 10/59 at p. 46.

which had occurred and the reluctance of witnesses to come forward when they were not certain that they might not again be victimised at a later date, prevented any effective prosecutions and only a few convictions were obtained.¹

(2) Two opposition members of Parliament from Togoland were prosecuted with eight others for conspiring to attack persons with armed force. The trial lasted over two months and the members of Parliament, with three others, were found guilty. The convictions were quashed on appeal on the ground of misdirections by the trial Judge.²

(3) R.R. Amponsah was tried for sedition on a charge of making public accusations that police officers in conjunction with the Government were conniving at the printing of extra ballot papers for the rigging of elections. He was acquitted on the ground that under the law as it existed the words were not seditious.³

(4) Although Amponsah and Apaloo were found by the Granville Sharp Commission to have engaged in a conspiracy to carry out an act for an unlawful purpose revolutionary in character, no such offence was to be found in the Criminal Code.⁴

All the reasons merely confirm that the Government was intolerant of the slow but fair process of the Rule of Law, and rather than correct whatever deficiencies there might be within the ordinary criminal law of the land, it preferred to rely on "emergency" power. This is supported by the fact that in 1960, the use of the Preventive Detention Act was extended to criminal gangsters whose activities were not political.

1. W.P. No. 10/59 p/ 29.

2. Ibid p. 25.

3. Ibid p. 32. The law of sedition was altered in 1959 to include an act of this nature.

4. W. P. No. 10/59 p. 17.

By the end of 1960 it is believed that three hundred and eighteen persons had been made the subject of preventive detention orders.¹ In 1961, fifty persons were detained under the Act following the declaration of emergency. They included four opposition members of Parliament and Dr. J. B. Danquah,² and Mr. J. E. Appiah, Deputy leader of Opposition. On November 6th 1963, the re-enactment of the 1958 Act empowered the continued detention, for a further five years, of many who had already been in prison since 1958. The International Commission of Jurists commented:³

"It is impossible to see respect for human rights and the Rule of Law when a man may be detained for ten years without ever being accused of any crime, let alone being tried and convicted."

In an authentic letter dated February 20th, 1965, addressed to the Right Honourable Harold Wilson, Prime Minister of Great Britain,⁴ smuggled out of a detention prison in Accra, the writers gave an eye-opening and informative account of the use of the Preventive Detention Act. The opening paragraphs read:

"Mr. Prime Minister,

We helpless detainees of this prison We also take this opportunity to draw your attention to our sad and distressing state, to appeal to you and through you to the 700 million peoples and their several governments of the Commonwealth to come to our aid so as to secure for us release from what appears virtual imprisonment for life for no other "crime" than that of political opposition and the fact that the core of us do not share

-
1. See Bennion, Constitutional Law of Ghana (1962) p. 224.
 2. E.1.172 of 1961. Dr. Danquah was the United Party candidate in the Presidential election of 1960. He died in detention on February 4th, 1965.
 3. Bulletin of Inter. Comm. of Jurists, No. 18, Mar. 1964 p.10.
 4. Shortly after the Labour Party won the General Election, 1964. The letter was first reported in the Times March 3rd 1965.

the clear neo-communists ideas of President Kwame Nkrumah and his associates.

None of us has been convicted of any crime, yet many of us have already completed close on 7, 6, 5, 4, or 3 years of imprisonment, as the case may be, in conditions of severity worse than those laid down by law and accorded to convict prisoners Here we number nearly 600:

(a) Members of Parliament and other leading figures and supporters of the party in opposition to Nkrumah's party at independence and subsequently brought together in the United Party of Ghana; their arrests began in November 1958 in an atmosphere of great calmness in the country but generally accompanied by specious allegations of activities prejudicial to the security of the state.

(b) So called Criminal Detainees arrested in the later months of 1960(following a ghastly crime of robbery with violence and murder in Accra,) they are mostly persons of known criminal records.

(c) A number of CPP members and supporters previously used by government and party leaders for shady activities (including criminal ones), frauds and extortions, their detentions were arranged by their principals to prevent the leakage of those activities as the persons became disgruntled.

(d) Personal enemies of government party leaders, regional and district commissioners who exercise the power of submitting names of persons to be detained.

(e) A body of paid government party workers - the propaganda unit' of the CPP Headquarters detained in 1962 because they are suspected of being supporters or sympathisers of their fallen party leaders, Adamafio, Ako Adjei and Kofi Crabbe.

(f) A number of very highly placed police-officers dismissed and later detained following an attempt to shoot President Nkrumah by a junior police officer in January 1964.

(g) Other persons detained upon spiteful but false reports made against them by personal enemies who happen to know what to say to get a person imprisoned under the Preventive Detention Act without inquiry, including persons detained so that their wives might become available for interested suitors, or their properties misappropriated by false claimants or their businesses destroyed.

There is a large number of persons unclassified. For some time now the government has dispensed with the statutory formality of giving to persons detained grounds of detention within five days as provided by the law. Quite logical since the Ghana Courts, under the leadership of Chief Justice Sir Arku Korsah - a registered member of the CPP - have abdicated their power of protecting Ghanaian citizens against imprisonment on trumped charges by conducting the trial called for under Habeas Corpus application. So persons are merely removed from their homes and sent into the prisons without being given any information whatever as to the reason for the action against them."¹

Whilst it is not here suggested that all the allegations in the letter were true, there were official confirmation of the number of detainees, several of whom were undeniably political opponents of the ex-President Nkrumah.

The International Commission of Jurists published their observations of the Ghana legislation. Their concluding observations were as follows:

-
1. Quoted by K. A. Busia, Africa in search of democracy (London) (1968) 129 - 131.
See also Times March 12, 1965.

"Without going into the political questions as to whether there existed or exists in Ghana a situation calling for legislation providing for preventive detention, it is apparent that there are certain factors in connection with the Ghana Act which, from a legal point of view, are not satisfactory.

(i) The maximum duration of the preventive detention seems long especially when it is taken into account that there is no indication that the term of detention comes up for regular review by the executive.....

(ii) On account of the inability of the detainee to face his accusers and put his case there appears to be an infringement of a rule of natural justice; written representations, it is submitted, are not enough.

(iii) There is no independent tribunal before whom the detainee can make his objection.

(iv) Those persons detained give the appearance certainly of being drawn very considerably from one political party.

(v) If the Akoto and Vanderpuye (two of the detainees) cases¹ are typically illustrative, the specific details filed on the grounds of detention appear inadequate.

(vi) Because of the narrow subjective interpretation of the words "if satisfied", the Courts have precluded themselves from investigating the grounds of the President's satisfaction. Judicial review, therefore, does not seem to have provided in Ghana a strong safeguard for the liberty of the subject".²

It will be seen, from the accounts of the use of the legislation which will be discussed later, that preventive detention can and did become a perpetual weapon of punishment and repression.

1. To be discussed later - See Chap. 5.

2. Journal of the International Commission of Jurists, Vol. 3 No. 2 (Winter) 1961, pp. 65 - 81.

TANZANIA

Tanganyika, like Ghana, has made more use of its preventive detention legislation than of powers which may be conferred by emergency legislation after a proclamation or declaration of a state of emergency. As already noted earlier, the Tanganyika legislation follows closely the Ghanaian counterpart, with the notable difference that any order of detention made under the Tanganyika Preventive Detention Act, 1962,¹ cannot be subject of review in any court of law.² As originally enacted the Act contemplated the enforcement of its provisions by the Minister of Home Affairs, but with the attainment of Republican Status, one of the incidents of such status was the transfer of the Minister's power to the President.

In April 1964, Tanganyika and Zanzibar formed a United Republic³ for which the name of Tanzania was adopted in October 1964.⁴ Under the Articles of Union interim constitutional arrangements (in the form of modifications of Tanganyika's republican constitution of 1962) were introduced whereby Zanzibar was to have what was essentially the status of a federal unit (though the word 'federal' was not used) with the United Republic. There was reserved to parliament and Executive of the United Republic exclusive authority for all matters in and for Tanganyika and for certain specified matters in and for the United Republic as a whole. The executive power in relation to all matters in Tanganyika and all Union matters in the Republic vests in the President. Union matters are those agreed to in April, 1964, inter alia, the constitution and government of the United Republic, external affairs, defence and emergency powers.

-
1. Act No. 60 of 1962.
 2. Sec. 2.
 3. Union of Tanganyika and Zanzibar Act 1964 No.22 of 1964.
 4. United Republic (Declaration of Name) Act 1964 No. 61 of 1964.

The only emergency as such which has been proclaimed in Tanzania since independence was in Zanzibar following the revolution in 1964. The Government of the Sultan of Zanzibar, Seyyid Janshid bin Abdullah, and his Prime Minister Shiekh Muhammad Hanadi was overthrown on January 12, 1964 by a "Revolutionary Party" which seized power and proclaimed the establishment of a Republic on the same day. The revolution was carried out by about 200 men who were led by "Field Marshall" John Okello and who seized armouries and swiftly over-powered the police station which surrendered after all-day fighting. A broadcast on January 12 announced that Sheikh Abud Karume, leader of the Afro-Shirazi Party, had been installed as President and that a new Government had been formed.

Among the causes given for the revolution by observers were the ff:¹

- (a) The Afro-Shirazi Party's resentment at being prevented from governing and even taking part in a coalition government with other parties, although it had gained 54 per cent of the votes in the elections of July, 1963.
- (b) The reported intention of the Sultan's Government to introduce Egyptians as officers and advisers;
- (c) Rising unemployment, largely as a result of Indonesia's curtailment of close imports from Zanzibar; and
- (d) The dominance of Arabs as landowners over Africans as tenant farmers. It was thought that the timing of the revolution might have been connected with the banning of the Umma Party.²

1. See Keesing's Contemporary Archives (1964) p. 19951 n.

2. The Umma Party led by Sheikh 'Babu' was banned on Jan.4 because it had refused to register as required by a new law. Sheikh 'Babu' himself left the country and arrived at Dar-es-Salam on Jan.9. He was made the Minister of External Affairs and Trade under the new govt. ff. the revolution.

The new Government immediately began to round up and "screen" supporters of the former regime suspected of possessing weapons; declared illegal the two coalition parties which had supported the previous Government,¹ all their property being seized, and banned the Sultan from the island for life. It was reported that about 2,500 persons were in prison or in detention and refugee camps, of whom about 400 were "strictly political prisoners" The country was proclaimed a one-party state on Jan. 30 by the President and this was confirmed by Sheikh "Babu", who declared that he had joined the Afro-Shirazi Party and had asked all his followers in the Umma Party to do the same.

Following the revolution, a state of emergency was proclaimed and this led to the introduction of preventive detention without limit by Presidential Decree.² Section 2 provides that where "the President is satisfied that any person is conducting himself so as to be dangerous to the peace and good order in any part of Zanzibar or is acting in a manner prejudicial to the defence of Zanzibar or the security of the Republic, "he may order that the person be detained!" This was followed by a round up of the members of the Nationalist Government which had been ousted by the revolution.

After the Union with Tanganyika, President Nyerere of Tanganyika announced that political prisoners in Zanzibar would not be released, nor would the property confiscated by Presidential decree be handed back to the owners. During the May Day Celebrations of 1965, a plebiscite was held which confirmed President Nyerere as the President of the United Republic of Tanzania and the President of the island of Zanzibar as the vice President of the Union. Following this, a further release of detainees took place and a Home office Ministry official

1. The Times, February 3, 1964.

2. Decree No. 3 of 1964.

stated in Dar-es-Salaam on October 8, that only 22 persons were still being held under the preventive detention legislation. They include 11 former members of the Nationalist Government of Zanzibar.¹

In mainland Tanzania, according to a Dar-es-Salaam report of January 28, 1968,² the number of persons detained under the Preventive Detention Act, 1962, was also given as 22 including eight members of the former Government of Zanzibar and six Goanese alleged to be spying for Portugal. Of the former, Sheik Muhammad Shamte Hamadi, the former Prime Minister, and Mr. Ubusih Jalah, former Minister of Communications, Works and Powers, were released on February 20, 1969³. It had however, been reported on January 1, 1963, that Mr. Abdulla Kassim Hanga who had been Minister of Local Government⁴ who had left the country in August 1967 had been arrested. Mr. Oscar Kambona alleged in London on January 4, 1968 that nearly 200 persons had been arrested in Tanzania and were detained without trial, and that President Nyerere was using the Preventive Detention Act to muzzle members of his own party; an allegation reminiscent of the Ghanaian allegations against ex-President Nkrumah. President Nyerere of Tanzania himself, whilst not denying the allegation admitted that he signed several detention orders, because he believed that in preserving national security, "our ideals must guide and not blind us." He asserted that "in the idealistic sense of the word, it is 'better' that 99 guilty men should go free rather than one innocent man being punished, but in the circumstances of a nation like our other factors had to be taken into account."

1. See Keesing Contemporary Archives Oct.9-16 (1965) p.21,000
2. Times (London) January 28, 1968.
3. See Keesing op.cit May 24 - 31 (1969) p.22375.

Here, in this Union, conditions may well arise in which it is better that 99 innocent people should suffer temporary detention than that one possible traitor should wreck the nation. It would certainly be complete madness to let 99 guilty men escape in order to avoid the risk of punishing one innocent person."¹

It would appear, therefore, that preventive detention was and has always been regarded more as a punitive than preventive measure in Tanzania, no less than it was in Ghana under President Nkrumah.

Shiek Abeid Karume, Vice President of the United Republic but generally described as the President of Zanzibar by the island's authorities, stated on April 25, 1968, that he wanted no further integration with Tanzania; that the current interim constitution providing for internal self-government on Zanzibar and Pemba was to continue indefinitely, and that no free elections would be permitted on the islands for "at least 50 years". He claimed that there were no "counter-revolutionaries" in Zanzibar and that no one was held under the Preventive Detention Act.²

But on November 20, 1968, a curfew was imposed for 10 hours on Zanzibar Town in what was officially described as a "mock emergency" with the People's Defence Force (of about 3,000) and police patrolling the streets after dawn - an unprecedented action since the revolution of 1964.³

UGANDA

Emergency powers in Uganda, as in all other ex-British territories were formerly granted and governed by the Emergency Powers Order-in-Council 1939 to 1961, which remained in effect for a short while after independence; however, the Uganda

-
1. Speech inaugurating the University Dar-es-Salaam as quoted Franck: op.cit. p. 231.
 2. Keesing's Contemporary Archives (1969) p. 22375.
 3. See Keesing's Contemporary Archives (May 1969) p. 22375.

(independence) Order-in-Council provided that they would cease to have effect on March, 9, 1963, if not repealed earlier by Parliament as in fact they were by the Emergency Powers Act, 1963 which came into force on February, 26, 1963.

The operation of the powers conferred by the Act may be seen in the legislation made early in 1963 when as a result of disturbances in some areas of the Kingdom of Toro, a proclamation was made by the then Governor-General, Sir Walter Coutts, declaring that a state of public emergency existed in the Isaza district of Busongora and Isaza of Bwamba. Following the proclamation,¹ the Emergency Powers (General Provisions) Regulations, 1963² was enacted. These regulations were very similar in substance to the Nigerian provisions of the previous year, perhaps because of the similarity of the federal³ structure of both countries.

The most unusual provision of the regulations provided that the Minister of Internal Affairs shall have power to appoint an administrator for the "Emergency Area" and the Administrator was enabled to make rules and Orders by statutory instruments and to delegate any of his powers to his deputies, assistants and agents. Various special offences were created and special powers conferred on the police and army officers. The Minister was empowered to make detention Orders and to make rules specifying the conditions of detention and to establish a tribunal to review such Orders according to the Constitution. The Minister was also empowered to make deportation and exclusion Orders.⁴

1. L.N. No. 47 of 1963.

2. L. N. No. 48 of 1963.

3. The constitution of Uganda had some important federal characteristics: the country comprised five "federal states" (the four kingdoms and the territory of Busoga) and ten "districts", plus the territory of Mbale. Each federal state had certain special provisions entrenched by the constitution of Uganda and alterable only by the legislature of each state. Each has its own ruler, Executive council of Ministers and legislature.

4. L.N. 44, 45 of 1963.

The Administrator ~~was~~ empowered to take possession of land and to requisition any other property in the interests of public safety or to maintain essential supplies and services.¹ Property other than land could be sold by the administrator as if he were the owner, but land and building had to be restored to the owner at the end of emergency. With regard to compensation, the regulations were of special interest: failing agreement between the owner and the administrator, compensation payable was assessed by a valuation board of three members appointed by the Minister, whose assessment ~~was stated to~~ be final.

The emergency in Uganda which gave much more scope for the use of emergency powers, however, was as is now generally accepted politically inspired. The situation is of particular interest because it illustrates the use of emergency powers following a one-man revolution.

The crisis followed the adoption by Parliament on February 4, 1966 of a motion by Mr. Dauda Ocheng (Chief Whip of the Opposition Kabaka Yekka Party) which aimed at the suspension of Colonel Idi Amin, second in command of the Armed Forces, pending a police investigation into his activities, and which by implication was based on serious allegations of bribery and corruption against Dr. Obote and the other Ministers.²

On February 22, 1966, the Prime Minister, Dr. Obote, issued a statement headed "Statement to the Nation by the Prime Minister", declaring that in the interest of national stability and public security and tranquility he had taken over all powers of the Government of Uganda. He thereupon dismissed five of his Ministers and immediately had them arrested and put under detention. On February 24, Dr. Obote disclosed that he had been

1. Emergency Powers (Requisitioning) Reg. 1963 LN. 50 of 1963.

2. See Keesing's Contemporary Archives (1966) p. 21272.

forced to take "certain drastic measures" because of events and "unwelcome activities of certain leading personalities", who had plotted to overthrow the Government; that during his tour of the Northern Region early in the month an attempt was made to overthrow the Government by use of foreign troops; and that certain members of the Government had requested foreign missions for military assistance consisting of foreign troops and arms for the purpose of invading the country and overthrowing the Government of Uganda. Therefore, he suspended the constitution but preserve all the main organs of Government. He also later divested both the President and the Vice President of their offices and of their authorities which he vested in himself.

Immediately thereafter the President of Uganda, the Kabaka of Buganda, was forcibly ejected from state house, his official residence, Then on April, 15, 1966, at an emergency meeting of the National Assembly, a resolution approving the action taken by the Prime Minister, abolishing the "Constitution which came into being on October 9, 1962", and adopting a new constitution "as the constitution of Uganda until such time as the constituent Assembly established by Parliament enacts a constitution in place of this Constitution", was approved.

The most important changes brought about by the new constitution were those limiting the rights of the constituent kingdoms, and in particular of the largest among them, Buganda. Specifically, the Kabaka's right to appoint local chiefs was made subject to the advice of the Central Government, and Buganda's right to certain revenues reverted to the discretion of the National Assembly. Although some members of the Lukiko (the Parliament of Buganda) had demanded a trade boycott in order to force Dr. Obote to revert to the previous constitution, the

Buganda Prime Minister, Mr. Mayanja-Nkanji, said that this could not be done and that the conventions of modern dipolomacy would have to be followed.¹ Thus the opposition of the Government of Buganda was subsequently expressed in two different actions: (i) a letter by the Kabaka to U. Thant, the United Nations Secretary-General and (ii) a demand by the Lukiko that the Uganda Central Government should leave the territory of Buganda by May 30.²

The Kabaka's letter appealed to U. Thant to use his good offices over Dr. Obote's seizure of power on the ground of inter-national friction. In support of his appeal, the Kabaka quoted a U. N. General Assembly resolution of December 1960 which stated that the disruption of national unity was incompatible with the purposes and principle of the U. N. **Charter.**³

The demand that the Federal Government should leave Buganda within a week made by the Lukiko on May 23, after it had declared the previous day that the abrogation of the 1962 constitution had cut the Kabaka's Government off from Buganda, which, however, insisted on recognising the old Federal Constitution.

Refuting the Lukiko's statement, President Obote declared on May 22, that his Government would continue to exercise its full executive and other powers in Buganda and that Buganda's

1. The correspondent of the Financial Times reported from Kampala on April 17 and 25 that the "dramatic introduction" of the new constitution had been widely supported by local government and political leaders and had been welcomed "almost everywhere in Uganda" as "marking the end of a long period of uncertainty", although the Buganda Government was maintaining its opposition.
2. Uganda's two largest towns, Kampala, the Capital and Entebbe, both lie in Buganda territory.
3. The Kabaka's letter was reported in The Times May 3, 1966.

attitude would have to be "firmly stamped out for the good of the country and the public interest." The next day, after the Lukiko had demanded the departure of the Uganda Government from Buganda territory, and a clash had occurred near Kampala between police and dissident Baganda in which five persons were reported killed, President Obote's Government proclaimed a state of emergency in Buganda.¹

Mr. Amos Sempa, who with five other members of the Lukiko had refused to take the oath under the Constitution, and three Buganda country chiefs were immediately arrested, and Kampala Radio declared that the Lukiko's demand was "tantamount to an incitement to violence" and that the Kabaka's letter to U. Thant was "an act of rebellion and treason."

A Government statement announced on May 24 that its troops had taken control of the Kabaka's palace² in order to seize a large supply of arms stored there "without the Government knowledge" and possibly "brought into the country illegally for the express purpose of overthrowing the Government." While the fighting gradually died down the following day, President Obote announced that although the situation was calm, the emergency regulations would remain in force.

Following the proclamation stricter emergency powers than those already operating in certain parts of Toro were put into operation including detention under Regulation 1 of the Emergency Powers (Detention) Regulations, 1966³. This vested power of detention on the Minister whenever "he is satisfied" that it was necessary for the purpose of maintaining public order.

-
1. L. N. No. 4 of 1966
 2. Mr. Onama (Minister of Defence) stated on May 26 that the Kabaka had escaped arrest. He was later reported to have turned up in Tanzania from where he proceeded to London.
 3. S. I. No. 65 of 1966.

One of the Kabaka's brothers, Prince Henry Kimera, who had escaped when the Kabaka's palace was attacked and had reached London, alleged on June 21, 1966¹ that an estimated 15,000 of the Kabaka's subjects had lost their lives in the events of May, 1966, and that another 8,000 were in detention. Mr. Sam Odaka, the Ugandan Minister of Foreign Affairs, then on a visit to London, on June 29, 1966 described the report of detentions and casualties as "exaggerated" and said that the Government estimated the number of death at 58, while of a total of about 705 persons held at the peak of the crisis only 55 were still in detention.²

At a ceremony marking the 4th Anniversary of Uganda independence on October 9, 1966, the President announced that, while no further measures would be taken to enforce Ugandan unity, the state of emergency in the Kingdom of Buganda would not be lifted until further administrative changes had been made. In fact, even after the Constitutional changes proposed in June 1967 had been finally adopted by Parliament sitting as a Constituent Assembly on September 8, 1967³ when Uganda officially became a Republic, Parliament extended the state of emergency three times,⁴ each time for a further period of six months.

1. The Times (London) June 21, 1966.

2. Guardian June 29, 1966.

3. By the new Constitution the four hereditary kingdoms were abolished, whilst the name of Buganda was completely removed the other three retained their names as provinces.

4. On November 3, 1967; April 25, 1968; November 1968.

Under the emergency regulation, a number of persons continued to be detained, including 21 men and women formally discharged in the High Court at Kampala on July 1967 after being accused of treason and of plotting to kill President Obote, his Ministers and to instal the Sir Edward Mutesa as the Emperor of Uganda; Mr. Abubakar Mayanja, a former Minister of Education in the Kabaka's Government and a leading member of the Opposition in Parliament, and Mr. Rajat Neogy, the editor of the magazine Transition.¹ According to a notice in the official gazette,² the total number of persons detained under these regulations was 15, including the sister of the late Kabaka. There is no doubt that these numbers have been greatly swelled by new detentions following the attempted assassination of President Obote in December 1969.³ President Obote was shot at and injured on the face by an unnamed gunman in Kampala on December 19, at the close of a Conference of Delegates of the ruling Uganda People's Congress (U.P.C.). Vice-President John K. Babuka immediately assumed control of the Government and declared a national state of emergency. The Democratic Party (the official Opposition) and all other parties except the UPC were immediately banned. Thus Uganda, by a stroke of the use of emergency power became a one-party state. Under the emergency regulations civilians were ordered to hand to the police any privately owned guns or ammunitions by noon on December 24 and were warned not to carry sticks or offensive weapons. In a number of clashes between police and

-
1. On Feb., 1, 1969, both Mr. Mayanja and Mr. Neogy were acquitted by the Chief Magistrate in Kampala of charges of sedition arising out of a letter written by Mr. Mayanja and published in Transition. Immediately after the acquittal both men were re-arrested for further detention under the emergency regulations.
 2. L. N. Feb., 17, 1969.
 3. See Guardian Dec. 20, 1969. The attempt was presumed to have been as a result of the death of ex-Kabaka, Sir Edward Mutesa whose death in London was announced on Nov. 21, 1969.

troops on the one hand and civilians on the other some Africans were reported injured.

Parliament approved the declaration of the emergency on December 22. Meanwhile about 10 leading opposition politicians had been arrested. They included the President of the Democratic Party, Sir William Wilberforce, former Vice-President of Uganda, the Publicity Secretary of the Democratic Party and Miss Nahrija Mpologome, sister of the late Sir Edward Frederick Mutesa, the former Kabaka of Buganda.

KENYA

Barely had independence been attained when the Government of Kenya had to bring into operation its emergency legislation, the Preservation of Public Security Act, 1960. This was caused by the continued unrest in the North Eastern Region occupied by Somalis who had been demanding secession and re-unity with their tribesmen across the border in Somalia. The agitation had been going on even during the colonial administration and was particularly intensified during the months preceding the grant of independence to Kenya.¹

In fact, on August 25, 1963, talks at the invitation of the British Government took place in Rome between the representatives of Britain and the Somali Republic. The talks were unsuccessful in that the British Government,

1. An example of trouble engendered as a result of the arbitrary delimitation of boundaries by the Colonial Administrators.

though legally responsible for Kenya until independence, declined to make any decision in the dispute~~the~~ the Northern Frontier District. Incidents began and continued to occur in the region including attacks by Somali tribesmen on border posts in which some soldiers were wounded and a Somali leader, Mr. Abdul Khalif, suspected of co-operating with the Kenya Government was kidnapped and removed to Somalia. The continued unrest in the region and the activities of nomadic Somali bands of armed shiftas caused Mr. Kenyatta to call an urgent Cabinet meeting at Gatunda on December 25, 1963. After the meeting the Government proclaimed a state of emergency¹ throughout the region and set up a five mile deep prohibited zone along the Kenya - Somali border, excluding the settlements of Mandera and El Wak.

There is no irrefutable evidence that the measures taken have been used in any respect other than for combating attacks from Somali Shifta and preventing people from harbouring or consorting with people who might aid the Shifta raids.²

Perhaps the minimal use can be explained not only by the fact that the emergency was necessitated by the need to fight an

1. L.N. of 1963. The declaration was approved by the House of Representatives on Dec. 31 but in senate the Kenya African Dev. Union (K.A.D.U) Opposition at first voted against the declaration, thereby preventing its approval by the constitutionally required 2/3 majority; after the intervention of Mr. Mboya (Minister of Justice) however a second vote was taken on which the Opposition abstained the measures the being approved.
2. President Kenyatta agreed to lift the emergency on the North-Eastern Region on Feb. 21, 1969. See: Keesing's contemporary Archives (May 1969) p. 23347.

an outside enemy, but also by the fact that under the Public Security (Detained and Restricted Persons) Act,¹ the President may make regulations for detention and restriction without the necessity for an emergency proclamation.² In fact, it was under this statute that a vast number of new regulations³ have been made and operated. These regulations provided for detention, government control of movement and the imposition of curfews.

The new regulations were first applied or operated on August 4, 1966 against six officials of the Kenya People's Union (K.P.U.) who were arrested by Special Branch Officers and were detained. Mr. Oginga Odinga, leader of the Opposition Party immediately accused the Government of resorting to "desperate and cowardly tactics of detention" and alleged that Kenya had been placed in a family of dictators together with "Salazar of Portugal, Verwoerd of South Africa and Ian Smith of Rhodesia".⁴ Mr. Odinga was himself arrested and detained for questioning. Mr. Arap Moy, the Minister of Home Affairs alleged that Mr. Odinga had travelled to Uganda under

-
1. Mr. Charles Njonjo, the Attorney-General introducing the constitutional amendment incorporating the Bill, explained that it was not designed to oppress people and impose a rule of tyranny, but sought to protect the stability and security of the state in case of war, internal disorder, a breakdown of economic system, or natural disaster." All of which are already accommodated under the Preservation of Public Security Act. 1960.
 2. An amendment was made in the Constitution shortly after the attainment of Republic to accommodate this provision of the Constitution (Amendment) No. 3 Act 1966 Act No.18 of 1966.
 3. E.G. Public Security (Detained and Restricted Persons) Regulations 1966. L. N. 212 of 1966.
 4. Keesings Contemporary Archives 1966 p. 21718.

an assumed name, and that he (Odinga) had gone there to collect money "from a certain foreign mission" in order to finance the K.P.U. He added, "The Kenya Government will not tolerate funds coming into this country for subversive ends and to disrupt the peaceful country that we are trying to build."¹ Mr. Odinga denied the accusations, describing them as "sensational fabrications" and saying that the purpose of his visit had been to consult lawyers in Kampala on the detention of nine members of his Party by the Government. According to a report, the K.P.U. were losing their supporters in their hundreds.²

The recent banning of the Kenya Peoples Union (K.P.U.) and the imprisonment of its leaders, including Mr. Odinga, ~~have~~ severely damaged Kenya's image as a state in Africa reasonably democratic and tolerant of opposition. The political crisis had its immediate cause in the assassination of Mr. Tom Mboya, Minister of Economic Planning. The ~~assassination~~ seemed suddenly to release fears and hostilities which up to July 1968 had somehow been contained and controlled by the dominant ethic of Kenya unity and progress. Suddenly it became plain that there were deep and bitter suspicions of Government intentions, and of those of the dominant Kikuyu members in particular. But the roots of the crisis are embedded in the fragile complexity of Kenya Society, in forces which existed long before independence and in alignments and realignments which are the product of the political struggles since then.

1. Official Report. House of Rep. Deb. Oct. 11, 1966.

2. New York Times October 9, 1966.

MALAWI:

Throughout the period of preparation for independence in Malawi, there was much activity at all levels as new ideas were put into practice and the many irksome functions of government amended or done away with. Politically, the Malawi Congress Party¹ increased its hold on the country and grew into one of the best-organised political parties in Africa, backed by an active party propaganda newspaper, the Malawi News. Small opposition group continued to spring up but these were soon overwhelmed by the party machine which had also, by this time, founded a militant wing of party men known as the league of Malawi Youth, under the Leadership of Aleke Banda.²

During the first half of 1964 when the country was in the midst of intensive preparations for the independence celebrations, violence broke out in some districts of the country between followers of the Jehovah's Witnesses and the league of Malawi Youth. For many years the Jehovah's Witnesses missionaries, most of whom were Americans, had been working in the country, assiduously gaining adherents to their pacifist and fundamentalist doctrine. An important cornerstone of this ideology is the rejection of all allegiance to governments or political parties, and, in the days of colonial administration, the activities of these missionaries

1. This party was but a successor to the proscribed Nyasaland African Congress. It was reorganised in 1959 towards the end of the Emergency and it was made clear that Dr. Banda would be invited to lead it once he was released from detention. He was released on 1st April, 1960.

2. Not a relation of the President.

were always looked upon as subversive element by the government. With a change in government, however, the Jehovah's Witnesses remained opposed to political parties of any sort and resisted demands from the Malawi Congress Party that they become card-carrying and paying members. In the Mlanji districts there were a number of incidents between these two factions, resulting in burning and a number of deaths. After the intervention of Dr. Banda, pressure was called off and the incidents stopped. With independence on the door-step, it was obviously felt that it was unwise to create an emergency situations, but the embers were already there and could be fanned into flame.

The independence celebrations were merely a formal acknowledgement of a situation that had, in effect, existed in Malawi since the beginning of 1964, for with the demise of the Federation, the Malawi Congress Party had been in full control of the country's affairs since then. But while the formal transfer of power is accompanied by enthusiasm, independence bring its own confusions.

During the colonial period the frustration of being under the restraints of "government" was turned against the colonial power and the promise of independence aroused much expectation of freedom from such restraint. Politically, as this is ~~was~~ usually at the root of all emergency situations, the leadership of the country found itself in the unaccustomed position of being the object of criticism in place of the colonial administration, and there were evidently a number of people within the party ranks ready to exploit grievances arising from the non-fulfilment of imagined, or real, opportunities. For these men, power at last represented the reward for much work and energy.

Dr. Banda's call for more work and economies in all domestic fields in order to make Malawi economically self-sufficient, his efforts to spur the economy by treating with the Portuguese who controlled Malawi's main outlet to the sea, the port of Beira; his seeking to preserve economic links with Rhodesia and South Africa; were at variance with what a large group of the population had grown to expect. Within the Cabinet, Dr. Banda's chief Lieutenants - Chipembere, Chiume, Chirwa and Yatuta Chisiza - had become increasingly dissatisfied with the role in which they found themselves. They resented being treated by Dr. Banda as being incapable of directing policy within their own Ministries and craved for greater responsibility and powers.

Shortly after the return of Dr. Banda in August 1964 from his post-independence tour of Britain - he attended the second summit conference of the organisation of African Unity in Cairo on his way back and reiterated his independent approach about the call for stronger sanctions against South Africa¹ - dissension within the cabinet heightened and in an effort to forestall an open revolt he threatened his cabinet that he intended to sponsor preventive detention regulations, based largely on those that had been in force during the closing stages of the colonial period and to which he himself had been subjected. But this did not avert the breach in cabinet for in late August, the breach came: Chiume, Chirwa, Augustine Bwanausi (who had replaced Colin Cameron² as Minister of Works) Willie Chokani (Minister of Labour) and Chisiza (Minister for Home Affairs) forced a confrontation with Dr. Banda. They

1. See Pike, Malawi (1968) p. 164.

2. Colin Cameron was one of Dr. Banda's few European supporters throughout the independence struggle and resigned his portfolio in protest against Dr. Banda's threat to introduce preventive detention regulations.

presented a list of grievances and asked him to revise his policies.

Initially, Dr. Banda agreed to consider these requests and he asked them to submit all their grievances in writing for his consideration. When the dissident Ministers presented their grievances in writing, these had expanded and it was probable that the tone of the document was openly hostile, for Dr. Banda later referred to it as a "Bill of Indictment". On September 3, 1964, Dr. Banda confronted his Ministers, and what transpired was later related by him to the Malawi Parliament on September, 8.

"That is why it was in this mood, a mood of defiance, that I met my Ministers last Wednesday Naturally they wanted to know what my decision was. I told them I had not made a decision. I was still thinking about it. "No", you must decide today, they said. The tickety must go, Skinner¹ must go, you must Africanise, you must have nothing to do with Portugal, Mozambique and Formosa but instead Peking China must be recognised immediately and all the rest of it". I told them 'No' I wasn't going to do any such thing. 'You cannot force me to do anything', I told them.'²

After he had asked for and got a vote of confidence, the Prime Minister dismissed ~~Chisima~~, ~~Chirwa~~ and Bwanausi from the cabinet, also Mrs. Rose Chibambo, a leader of the League of Malawi women and a Parliamentary Secretary, for her complicity. ChisiBa

1. A reference to the Skinner Report on the African civil service, which had recommended the pegging of salaries and which Dr. Banda had accepted.
2. G. P. Murdock, Africa - its Peoples and their Cultural History, P. 231.

and Chokani resigned in sympathy and when Chipembere returned from Canada, he too resigned.¹

Following this, the Public Security Regulations² used during the last stages of colonial rule were brought into operation as provided for by Section 3 of the Preservation of Public Security Act, 1964,³ which states:

3. - (1) If at any time the Minister is satisfied that it is necessary for the preservation of public security so to do, he may declare that the provisions of sub-section (2) shall come into operation and thereupon those provisions shall come into operation accordingly" Sub-section (2) empowers the Minister to make regulations for several specified matters including detention, restriction, prohibition of assemblies and in general anything that is required for the exigencies of the situation.

The Regulations inevitably provided for detention, -
"3 - (1) The Minister may, if he considers it to be necessary for the preservation of public order so to do, make an order against any person directing that he be detained.

(2) Any person in respect of whom a detention order has been made may be arrested without warrant by any administrative officer, police officer or any member of the Armed Forces of Malawi.

(3) The Minister may at any time revoke or vary any detention order or may direct that the operation of such order be suspended subject to such conditions, if any, as the Minister may think fit, and may at any time revoke any such direction or suspension or vary such conditions."

1. See Keesing's Archives (1965) Col.20331. Dr. Banda described the Ministers as men of "avarice and ambition" who would have murdered him in cold blood.

2. G. N. 70/1964.

3. Cap. 14: 02.

The regulations also provided for restriction orders which were called "Control Orders" - reg.4., control of fire arms and explosives, and the use of force, including lethal weapons in order to arrest or prevent the escape of an arrested person. The latter provision is most surprising in the fact that such use is not confined only to members of the armed forces and the police but also to "any administrative officer", a term which is nowhere defined in neither the main Act itself nor in any of the subsidiary legislation.

The situation might have indeed been fraught with danger since some of the ex-ministers, particularly Chipembere, enjoyed a considerable personal following within the country, and the Prime Minister probably genuinely felt that the introduction of these measures would have the psychological effect of preventing a deterioration of the situation. But within a few days there were several incidents of violence and clashes between pro-ex-Ministers group on the one hand and members of the Malawi Young Pioneers and League of Malawi Youths on the other. For one whole day - September 15, the Zomba township area was completely in the hands of the dissidents and all African Civil Servants remained at home to (they said) protect their families from acts of intimidation by pro-Banda supporters.¹ The offices of the Malawi Congress Party were burnt down and the recently raised Malawi national flags flying outside government buildings were hauled down and burnt. The aftermath was the fleeing from the country of the dismissed Ministers, except Chipembere. But shortly afterwards, he was restricted within three miles radius of his home at Malindi under the regulations.² He escaped from

1. See Keesing's op.cit. Sep. 15 (1964) Col.20331.

2. Chipembere refused to accept this restriction order and soon slipped out to the Mangochi Hill where he formed an army and ~~ran~~ in a series of morning battles with the security forces. A price of £500 was placed on his head.

restriction and after an abortive coup in February 1965, he fled the country,¹ but his departure did not end the insurrection which he left behind.

Before the crushing of the abortive Chipembere insurrection, Dr. Banda tightened his grip of leadership. By a Constitutional Amendment passed in November 1964, provision was made for preventive detention, **when** such detention "was reasonably required in the interest of defence, public safety and public order," and is authorised by law. Although no preventive detention legislation was enacted, the authorisation of law required was given in the Security Regulations made in February of the following year.² The provisions **empower** the Minister to make a detention order if he "considers it to be necessary for the preservation of public order," a phrase that seems to leave him a much wider scope than the words used in the constitutional amendment. Persons in respect of whom such orders are made can be arrested without warrant. Detention may be for an indefinite period, but the Minister may suspend a detention order subjecting the person against whom it is made to restrictions relating to his employment, residence, contacts with other persons, movement and possession. The effect of a suspended detention order appears to be potentially very similar to the house arrest orders frequently resorted to by the South African Government.

-
1. He went originally to Tanzania, then to the United States where he was until 1968 when he returned to Africa to live in Dar-es-Salaam.
 2. Public Security Regulations, 1965 G. N. 43 of 1965.

Perhaps the most reminiscent (of colonial days) provision of the regulations is that by which a person may be arrested and detained for a period of 28 days even without a detention order being made. Reg. 3(7) reads,

"Any authorised officer may, without warrant arrest any person in respect of whom he has reason to believe that there are grounds which would justify his detention under this regulation and any such person may be detained for a period not exceeding 28 days pending a decision whether a detention order should be made against him."

In addition to all these powers certain areas may be declared to be special areas where additional precautions may be taken.¹

The extensiveness of these provisions need hardly be emphasised. But what must cause some apprehension is the fact that there appears to be a lack of the kind of safeguards, as we shall see later,² which Judges in free courts of law can use to ensure that objective standards are employed in assessing the requirements of the safety and stability of the state.

The resulting position in Malawi is that people will live in an atmosphere of fear and intimidation - there is no fixed duration or operation procedure to the regulations, An unknown number of people are held in detention camps. The President stated at one time that some of them will be detained for life if necessary. However, on the occasion of the inauguration of the Republic on July 16, 1966, 230 political detainees were released

1. Within a few months virtually the whole of Northern part of the country had been declared special areas: The whole District of Fort Johnston and Kasupe - G. N. 54/1965.

2. Chapter 6.

leaving an unknown number still in detention.¹

Thus, President Banda reverted to repressive measures and method of colonial administration mainly to crush opposition which he considered subversive, but with an increase in intensity. Now by the innovations in the Republican Constitution, legislation of the utmost repressive type can be introduced by a simple Act of Parliament or regulation, in a state where there is virtually no Opposition. Thus the Government does not need any longer to resort to Constitutional amendment as it had to when preventive detention was introduced as a permanent feature of government, nor need a formal proclamation of emergency be made before wide discretionary powers of the emergency legislation type are conferred on the Executive. It is, therefore, not surprising that little use has been made of the Emergency Powers Orders-in-Council 1939 - 1962.

ZAMBIA

Zambia not only inherited colonial powers of dealing with an emergency but also a situation where it was already in use at the time it achieved independence. Serious disorders and clashes costing many hundreds of lives occurred in the areas around Chinsali, in the Northern Province and Lundazi, in the Eastern Province, towards the end of July and August 1964 as a result of the activities of an African sect known as the Lumpa Church.

The Lumpa Church had been founded in 1955 by Mrs. Alice Mulenga, a Bemba tribes woman, who called herself Alice Lenshina (the name being a Bemba corruption of the Latin Regina) and who claimed to have died in 1953 and subsequently been resurrected.

1. Bulletin of International Commission of Jurist No. 27 Sept., 1966 p. 24. In February 1966, the Attorney-General when questioned about the number of detainees put the number at not less than 500, while other lawyers estimated that the total is between 1,000 and 1,500.

Saying that she had been "ordered" by God to be baptised, she joined the Church of Scotland as Alice Lubishi and later married Peter Mulenga, a political organiser. In 1955, she claimed to have been told by God, in another vision, to found a Church for Africans in order to end what she called the withholding of "certain divine revelations" from the African, allegedly practised by the European Christian Churches. In setting up the Lumpa Church, which with its strong African Nationalist appeal was joined by thousands of nominal Roman Catholics and members of the Church of Scotland, she evolved a set of 12 "Commandments" which were simple direct and easily understood by her uneducated followers. They included the prohibition of polygamy, smoking and drinking, to which was later added a ban on political activities. By the most important of these "Commandments" - "Thou shall not make medicine or make use of witchcraft" she laid the basis for the sects exclusiveness, as whoever was not of the Lumpa Church fell, in the eyes of its members, under suspicion of witchcraft; this in turn led to an attitude of intolerance, intimidation and terrorism on the part of the Lumpa followers.

According to a statement on August 5, 1964 by Dr. Kaunda, the Prime Minister of Zambia (as he then was), the Lumpa Church, whose strength he estimated at 30,000, had helped African nationalism during its first seven years of existence, and had not issued its injunction to take no part in politics until 1962. He admitted that Lumpa followers had suffered attacks at the hands of "Zealous" members of his United National Independence Party, but stated that he had given instructions not to molest the sect. These first clashes had resulted from the refusal of the Lumpa Church supporters to buy UNIP membership cards;

after the establishment of the U.N.I.P. Government they also came to regard the police, troops, and eventually all non-members of their sect as enemies against whom a "holy war" had to be waged.

After a meeting with Mrs. Lenshina, Dr. Kaunda issued an ultimatum requiring the Lumpa members to lay down their arms and leave their fortified villages by July 20, 1964. A few days after this ultimatum, however, renewed clashes broke out, leading to the intervention of security forces. When on July 24 specially trained riot police entered a fortified village in the Chinsali District, an European Assistant Inspector and an African Constable were killed.

In view of the deterioration of the situation more than 1,000 troops were sent to aid the police in Chinsali during the next few days and at the request of the Prime Minister, the Governor, Sir Evelyn Hone, assumed emergency powers on July 27, 1964.¹ These powers were assumed by the President when Zambia became independent as a Republic within the Commonwealth on October 24, 1964.

Among the powers that were assumed under the Emergency Powers (General) Regulations 1964, included the power of detention, restriction and conscription for service. Addressing the Legislative Assembly on July 29, 1964² on the extensiveness of these powers, Dr. Kaunda explained:

"The situation has continued to deteriorate, with unprovoked attack upon the police and upon the inhabitants of villages

1. G. N. 374 & 376.

2. Nat. Assembly Deb. July 29, 1964.

adjacent to the Lumpa settlements. I believe that even though there may be further casualties (Reservists had been called up) within the next few days, in the long term this will mean a saving of lives. We wish to be cruel now in order to be kind in the future."

On August 3, the Lumpa Church was declared an unlawful organisation, the penalty for continued Lumpa activity being a term of imprisonment of up to seven years. It was added that the order would be revoked in a month's time if law and order were restored, and that Mrs. Lenshina would be arrested and would have to answer criminal charges. On August 12, Mrs. Lenshina surrendered and was taken to a detention camp, with several of her followers.

A Commission of Inquiry¹ was set up to enquire into the Lumpa Church disturbances and its report was published in September, 21, 1965. The report blamed both the Lumpa Church and the provincial officials of the U.N.I.P. for having caused the unrest, stating: "The local U.N.I.P. view was that (Mrs. Alice) Lenshina was trying to set up a state within a state and that various anti-U.N.I.P. leaders (Welensky, Nkambula, Mchello and Tshombe) were encouraging her to do so. On the other hand, the Lumpa Church leaders were becoming more firmly convinced that U.N.I.P. was determined to eradicate the Church."² The report absolved the party's national leadership and President Kaunda from any responsibility, saying, that they had "tried every means to avoid the showdown", but recommended that consideration should be given to the bringing of criminal charges against

-
1. Report of the Commission of Inquiry into the Lumpa Disturbances 1965, Lusaka Government Printers.
 2. Report of the Tribunal on Detainees, 1967, Government Printers, Lusaka.

Lenshina. At the same time, the emergency was extended for a further six months by the National Assembly,¹ and Mrs. Lenshina and husband were restricted" to a remote part of the country in their own and the country's interest". President Kaunda declared that as the security of the country was his "first responsibility", anyone who misbehaved would be restricted to certain areas or detained.²

Following the Rhodesian Unilateral declaration of Independence, further security measures were introduced and approved. These included regulation for deportation, censorship and immigration controls,³ and a further extension of the emergency was approved. President Kaunda stated that this was necessary for three reasons: (a) the increasing number of people being drawn to the Lumpa sect, particularly in the Copperbelt district and thus constituting a threat to security in that area (b) the Rhodesia situation which made it necessary to secure 'lifelines' to the North and (c) continued industrial unrest in the Copperbelt area. Thus, although there was still need to ensure political stability, the emphasis had shifted more to economic security. Thus following this, several foreigners were ordered to be deported for allegedly causing racialism and industrial unrest.⁴ The use that has been made of these regulations have been mainly directed at foreigners who may have been suspected of passing information to the Rhodesian Government or suspected of being in sympathy with the Smith Regime. For instance, all Rhodesians publications were banned and several detention and deportation orders were made for contravening the emergency regulations by distributing Rhodesian

.....

1. See Keesing's Contemporary Archives 1965-6 p. 21511.

2. Ibid.

3. Ibid.

4. Two British subjects successfully challenged the legality of the orders in the Kitwe Magistrates Courts but were immediately served with new Orders.

material and also for allegedly conspiring with agents of a foreign power to use information "to cause alarm and despondency among the public" and with having "obtained or collected information relating to public security in Zambia" for the benefit of a foreign power.

The attitude of the President to the use of such extensive emergency measures is well illustrated in his own words. He wrote, "When a state of war exists, all nations restrict certain freedoms in the interest of national survival. The new states of Africa are in such a condition of national mobilisation. They are at war against terrible though impersonal enemies. There is not time for endless debate and arguing". He was quite definitely sure that he did not consider detention without trial of anybody, whether citizens or foreign nationals, during a period of public emergency, as being contrary to international law.² However, already there are indications that a number of the emergency powers created within the last few years have subsequently and sometimes within a matter of weeks been modified or repealed.

-
1. Morris, A humanist in Africa: Letters to Colin Morris by Kenneth Kaunda p. 108.
 2. See 1968 Annual Survey of Commonwealth Law p. 1.

GENERAL COMMENTS

The threat of elements within a nation sufficiently strong to disrupt the life of a country and jeopardise the existence of the prevailing form of government is a problem of accelerating importance in the modern world and even more so, probably, in the newly-independent African States. The actuality of such elements may stem from a variety of causes. Perhaps the most common is the disloyalty to the existing form of government, often accompanied by the desire to effect change by violent methods and means. Other causes may be strong disaffection with certain government policies, communal demands for States within a federation on linguistic or religious or racial lines, and the presence of powerful lawless elements with political motivations.

All the newly - independent Commonwealth African Governments are faced with the problem of building nations within the arbitrarily drawn geographical frontiers that they have inherited from the colonial powers.¹ It is difficult to fight the enemies of poverty and ignorance and disease according to the Westminster rules. The people of these States often have unnecessarily high hopes and expectations and they are apt to be quickly disillusioned with the first fruits of independence. Therefore, the situation and circumstances which justified the colonial 'Masters' in providing for and using emergency powers still exist in a different form and content after independence. The effective method, they have been taught, by which to deal with organised opposition to constituted authority, insurrection, threatened subversion of the state, and generally the maintenance of the wheels of development, is by the use of wide

1. E. g. Kenya and Somalis on its Eastern border wishing to be united with their tribesmen across the border.

discretionary powers, emergency powers; whether such an emergency actually exists is of secondary concern. It is not difficult to imagine a threat of subversion. "Emergency can be real or they can be conjured up to bolster the use of naked force."¹

Emergency powers were used time and time again by the colonial administrators in situations which were in no way as grave as ~~war~~-time emergency and for purposes which were sometimes not connected or necessary for the purpose of dealing with the situation that existed. It is now being used by the successors to power in the same way and for basically the same purpose, that is, to remain in power at all cost.

The creation and operation of powers of arrest without warrant and the power to detain for limited periods without trial is perhaps almost inevitable in periods of emergency. There ~~were~~ such powers in the United Kingdom and the older Commonwealth countries in the emergency created by the two world wars. It is perhaps also almost inevitable that ~~these~~ powers should be developed in the young emerging nations of the Commonwealth when situations arise which could wreck the stability ~~they~~ are trying to build.

In actual practice, governments in Africa, ~~as we have seen~~, have not been ~~spending~~ in the exercise of the power of preventive detention, especially out of all types of emergency powers, a power that should be used in a free society only in serious emergencies. As President Nyerere of Tanzania expressed:

-
1. Professor T.O. Elias "Report of Committee I Committee on Human Rights and Government Security" African Conference on the Rule of Law - Lagos 1961.

"..... This is a desperately serious matter. It means you are imprisoning a man when he has not broken any written law, when you cannot be sure of proving beyond any reasonable doubt that he has done so. You are restraining his liberty, and making him suffer materially and spiritually, for what you think he intends to do, or is trying to do, or for what you believe he has done."¹ In Africa, as seen already, the euphemism discernible in the term 'preventive detention' does not appear to contribute to the physical comfort or the spiritual well-being of the detainee when, as happens often, he is treated like a convicted prisoner.

The last Prime Minister of Nigeria, Sir Abubakar Tafawa Balewa, who claimed that the Government of a country had need of a certain power to curb subversive activities, in order to protect itself and its citizens from being destroyed, seemed to have washed his hands off responsibility when he said in relation to the abuse occasioned by such extra-ordinary grant of power that the power could be easily abused and that he as Prime Minister could not give any guarantee that such a power would not be abused.²

There is danger when the peoples of a nation are made to live in a perpetual state of emergency, and it is difficult to accept the reality or otherwise of some of the various emergencies alleged to have given rise to the necessity to confer wide powers upon the executive. The greatest threat to personal liberty arises, as we have seen, when the executive exercises the emergency powers of detention and restriction.

-
1. Speech inaugurating the University Dar-es-Salaam: Franck op. cit.
 2. Federal Parliament Debate 7th September, 1963. Col.2683.

Thus, the question arises whether a nation must have preventive detention legislation as a regular feature of the law? Must a nation depend, particularly in normal times, for protecting the security of the state or public order or the supply of commodities essential to the community on laws of Preventive Detention? Or should a nation perfect the ordinary criminal law machinery by suitably amending existing laws if their constitutionality has become questionable: by re-inforcing them if their provisions are discovered to be insufficient and by improving the intelligence, prosecution and other means of the Executive, if these are unequal to the task of bringing offenders to book under the ordinary criminal law? This question, involving an assessment of social realities and Government resources and of balancing these with the need to maintain and strengthen the democratic principle in the African policy can not without a degree of egotism be answered by a single individual.

Various excuses are given by African Leaders for the enactment of a detention law as a permanent feature of law and its use in times other than strictly public emergency periods. Perhaps none is as convincing as the explanation based on the inadequacy of the security machinery of the newly independent Commonwealth African States.¹ The belief expressed by the Ghana Government during President Nkrumah's regime that preventive detention could be a humane alternative to prosecutions could not have been intended to be taken seriously. The suggestion is that the full vigours of the law are not exacted when a person is detained, whereas had

1. By the President of Tanzania speech quoted by Franck: comparative constitutional process p. 290.

he been tried and found guilty he was likely to face a maximum penalty which could be capital punishment. The assumption here is that all detainees are undoubtedly guilty of crimes known to the law.¹

One would have thought that in a great majority of cases the objective of detention is to nip subversive design in the bud. Even if preventive justice is regarded as a punitive measure and therefore an alternative to criminal prosecution, it would have logically followed that the citizen would be granted an option in the matter, that is to say, to be detained indefinitely or to stand his trial.

The eradication of acts and elements which interfere with the security of a nation may necessitate, as already pointed out, the use of wide discretionary emergency powers, but more frequently in the newly-independent African States within the Commonwealth, instances abound which suggest that the preservation of national security is not always the guide for action, and that in its stead has been substituted for the test of what is considered generally 'subversive', what is seemingly over critical or only politically unpopular.

The discretion of the administrator must be tempered by the realisation of the justification for the creation of the powers. When nations are engaged in struggles for their national stability and integrity that which interferes with the task must be checked, but unless that which is suppressed is in fact obstructionist, the executive thereby endangers the national security in that the Government sits on an unerupted volcano which when it erupts destroys not only the edifice but also its foundation.

-
1. Statement by the Government on 1961 conspiracy W. P. No. 7 of 1961. p. 34.
See also West Africa December 16, 1961.

CHAPTER FOUR

EMERGENCY AND THE CITIZEN'S RIGHTS

The general and traditional attitude of the English man towards constitutional affirmation of fundamental human rights has been of disapprobation. Let us recall some of the statements indicative of this attitude. We may start with Jeremy Bentham's scathing comment on the French Declaration of the Rights of Man and the Citizen:

"Look to the letter, you find nonsense - look beyond the letter, you find nothing there are no such things as natural rights - no such thing as natural rights opposed to, in contradistinction to legal Natural rights is simple nonsense.... nonsense upon stilts."¹

Again the opinion of the Indian Statutory Commission with respect to the question of safeguards for minorities is typical.

"Many of those who come before us have urged that the Indian constitution should contain definite guarantees for the rights of individuals in respect of the exercise of their religion and a declaration of equal rights for all citizens. We are aware that such provisions have been inserted in many constitutions, notably in those of the European states formed after the war. Experience, however, has not shown them to be of any great practical value. Abstract declarations are useless, unless there exists the will and means to make them work."²

1. Anarchical Fallacies: Works (Bowring), vol.II, pp. 497, 500-501; and see further de Smith, "Fundamental Rights in the Commonwealth" 10, I.C.L.Q. (1961) pp. 84.
2. Report, Vol.II, Cmnd. (1930), pp.23-24. Popularly known as Simon Commission after Viscount Simon who was its Chairman.

Commenting on this opinion the Joint Parliamentary Committee on Indian Constitutional Reform said, "With these observations we entirely agree, and a cynic might indeed, find plausible arguments, in the history during the last ten years of more than one country, for asserting that the most effective method of ensuring the destruction of a fundamental right is to include a declaration of its existence in a constitutional instrument. But there are also strong practical arguments against the proposal which may be put in the form of a dilemma: ~~for~~ either the declaration of rights is of so abstract a nature that it has no legal effect of any kind or its legal effect will be to impose an embarrassing restriction on the power of the legislature."¹

This trend has continued in the writings of several eminent lawyers. Thus Sir Ivor Jennings wrote:

"In Britain we have no Bill of Rights, we merely have liberty according to the law, and we think - truly I believe - that we do the job better than any country which has a Bill of Rights or a Declaration of the Rights of Man."²

"The ideal constitution would contain few or no declarations of rights, though the ideal system of law would define and guarantee many rights. Rights cannot be declared in a Constitution except in absolute and unqualified terms, unless indeed they are so qualified as to be meaningless."³

1. H. L. 6 and H. C. 5 Session 1933-34, p. 216
2. The Approach to self-government, (1956) p. 20
3. Modern Constitutions 1960 (O. U. P.) p. 70.

Opposition by other commentators has been induced by the state of civil liberty in modern times, especially in countries where Bills of Rights have been written into the constitutions and by the constitutional jurisprudence of the Supreme Courts of the United States and India.¹ Moreover constitutional provisions with respect to individual rights take various forms and might deceive the unwary, since besides having varying substantive contents, they are not uniform in their effects. They may be in the nature of mere statements of the objectives that are intended to be or must be pursued.² On the other hand they may take the form of strict rules of law designed to confer rights on the individual with a corresponding duty on others, including state organs, to respect these rights, or to restrict the competence of the legislative and the executive organs of the state for the protection of individual interests the individual may or may not be accorded the right to take action in the Courts to safeguard those rights and interests.

Again, it is said, the English man regards a Constitution as a strict legal document in which there is no place for political manifestos or creeds and above all he feels that his own country's method of ensuring individual liberty is better and more secure than any devise attempted elsewhere in the World. Hence Dicey was able to say that for practical purposes the Habeas Corpus Acts were "worth a hundred constitutional articles guaranteeing individual liberty."³

-
1. See Wheare, op.cit. Chap. 3 and de Smith op.cit. p. 86.
 2. As the provisions to the Preamble to the Indian Constitution of 1950 and the Directive Principles of Social Policy in Art. 45 of the Constitution of the Republic of Ireland 1934.
 3. The Law of the Constitution, 15th Edn. p. 199.

In the United Kingdom the law relating to the liberty of the subject is embedded in the Common Law. For example, the right to personal freedom is secured by the famous writ of habeas corpus. Whenever any person is detained against his will, whether by an organ of Government or by a private individual, provided it is not pursuant to a sentence of the Courts, the detained person or anyone on his behalf is entitled to apply to any of the Judges of the High Court to determine whether his detention is lawful or not. The Court will then by means of this writ command the detainer to bring the detained before it, and, unless the detention is shown to be lawful, the Court will set him free at once.

Any person may say or write whatever he pleases so long as the matter is not defamatory or obscene, treasonable or seditious or otherwise likely to provoke a breach of the peace. People can move freely as long as they do not commit a nuisance or trespass on private right of property or otherwise contravene the ordinary police arrangements for the regulations of traffic and public order, and do not infringe the laws relating to riots and unlawful assembly. Respect for fundamental rights and freedoms of the individual in the United Kingdom does not, therefore, depend on a Bill of Rights. Yet an Englishman cannot be successfully challenged if he asserts that these rights and freedoms are no better protected in any country in the world.¹ In the light of this, his lack of sympathy for Bill of Rights and his traditional antipathy for constitutional affirmations of fundamental human rights are understandable.

1. See D. C. Holland "Personal liberty in the Commonwealth"
11 Current Legal Problems. p. 151.

Until very recently the entire Commonwealth was outside the movement to embody within their written constitutions provisions designed to protect fundamental human rights. The English attitude, the United Kingdom being the mother of the Commonwealth, could not have failed to help bring about this state of affairs. However, Britain soon had to change its attitude in tropical Africa when it was realised that something more than the negative approach to fundamental rights was being demanded by these countries. Ironically, much of the credit for this change is due to the Council of Europe, which thereby made a greater impact on Africa than it ever did in Europe.

The Council had drafted a Convention of Human Rights designed to give legally enforceable effect to the aspirations expressed in the Universal Declaration of Human Rights. The United Kingdom not only ratified it but rather surprisingly, extended it to forty-two of her dependencies, including all those in Africa except Southern Rhodesia.

The practice of protecting one or two individual rights in Commonwealth Constitutions was first developed in the Australian and Northern Ireland Constitutions. This was continued in India in the Government of India Act, 1935, after the Simon Commission and the Joint Parliamentary Committee had rejected the request for a Bill of Rights to be written into the Constitution, and later continued by the United Kingdom Government in Ceylon in 1947 and Ghana, 1957.¹ But what constituted a decisive change of attitude by the United Kingdom Government was the incorporation of a comprehensive set of fundamental rights into the Nigerian Constitution in 1959.²

1. S. 1. No. 1533 of 1957; Pt. II, Art. 5-13.

2. Nigerian Constitution 1960 Chap. III.

It is believed that the first suggestion for the insertion of clauses guaranteeing fundamental rights in the Constitution was prompted by the allegation that certain sections of the community were denied some of these rights in parts of the country and by local political rivalries.¹ When it was first suggested by an alliance of two parties, the Action Group (A. G) and the National Council of Nigeria and Cameroons (N.C. N.C.)² their main aim was to have a measure which would enable them and their supporters to operate freely in the Northern Region, largely dominated by the Northern Peoples Congress, the third major political party. Hence they suggested that, "the amended Constitution should contain a declaration of certain basic human rights ... for Nigerian Citizens in all parts of Nigeria." This suggestion was dismissed by the Colonial Secretary who sealed his disapproval by ridiculing some of the clauses of the proposed "Charter of Human Rights."³

At the 1957 Conference, one of the parties, the Action Group (A. G) again sponsored the question of incorporation of a Bill of Rights in the Constitution and it was agreed without much difficulty that one should be written into the Constitution. In suggesting clauses for the proposed Bill, the Commission set up under the Chairmanship of Sir Henry Willink to consider proposals relied on the provisions of the European Convention of Human Rights and almost all the rights and freedoms recommended were copied from the Convention.⁴

-
1. For events leading up to the suggestion at the London Conference, See Odumusu: The Nigerian Constitution (1963), Holland "Human Rights in Nigeria" (1962) 15 C.L.P.159.
 2. See generally Ezera, Constitution Development in Nigeria (1961), Ch.8 and Awo: Chief Awolowo's Autobiography (1961) p. 202n.
 3. See: The Memoirs of Lord Chandos (1962) p. 410.
 4. Cmd. 505 of 1958.

The 1958 Constitutional Conference accepted practically all the Commission's recommendations. Hence the country got a Bill of Rights before independence in 1960. The Republican Constitution retains the provisions.

It is not easy to discover the reasons for this significant shift in the traditional English attitude with respect to constitutional affirmations of fundamental rights, but it is believed that the recommendation of the Willinck Commission was decisive in influencing the Government's acceptance of the bill of rights.

In Uganda, writing fundamental rights into the constitution proved attractive to political leaders on the eve of independence because of the acuteness of the rivalry between parties, regions and individuals. The Munster Commission had recommended verbatim reproduction of the Nigerian provisions as well as the establishment of a Council of State on the Kenya pattern.¹ The latter recommendation was rejected since it was felt that a Bill of Rights contained ample safeguards against discrimination.² The paramount intention of Uganda's Bill of Rights (which though modelled after the Nigerian provisions was not a verbatim reproduction of the latter as envisaged by the Munster Commission) was to limit the powers of the government lest it yielded to the temptation as in some African countries to adopt an increasingly arbitrary or authoritarian approach to its powers and responsibilities. The immigrant Communities particularly the Asians, (with their important commercial and proprietary interests), found the provision for the protection of property rights especially attractive.

1. Report published in Entebbe, 1961.

2. Cmd. 1523 pp. 29-30 Constitutional Report.

Kenya's inclusion of a Bill of Rights in the Constitution was almost a matter of course, since none of the political parties dissented from it. Mr. Ronald Ngala who headed the former Kenya African Democratic Union (K.A.D.U) delegation told the 1962 Constitutional Conference that the proper working of democracy and the Rule of Law demanded such an arrangement. The Kenya African National Union (K.A.N.U) for its part had always regarded a Bill of Rights as less objectionable than regionalism, as tending to promote national unity rather than disunity. Moreover, K.A.N.U. leaders were intent on demonstrating to the suspicious elements in the country and to the outside world their dedication to the Rule of Law. As in Uganda, the immigrant communities, more notably the Europeans (with their considerable farming interests) welcomed the protection afforded by constitutional guarantees. The result was the adoption of the Ugandan provisions adapted where necessary to render them applicable to Kenya. An unusually stiff method of entrenchment was employed but the Republican Constitutional Amendments¹ have since relaxed the entrenchment provisions to bring them into line with what obtains in other countries.

In the former Nyasaland (Malawi) attitude to fundamental rights was at first cautious. At the Constitutional Conference of 1960, it was decided that Constitutional guarantees of fundamental rights would be premature.² The 1962 Conference, however, reversed this decision; there was a general agreement that the proposed constitution should contain a Bill of Rights based on the Uganda provisions.³ It is noteworthy that Dr. Kamuzu Banda who led the Malawi Congress Party to the Conference did not object to an enforceable Bill of Rights; but he saw it not as a protection for minorities, the true guarantee for whom was the

1. 1964, Act. 28; 1965 Act 14.

2. Report, 1960 Cmd. 1138 p. 8.

3. With certain modifications. Report of Nyasaland Constitutional Conference, Cmd. 1887 pp. 8, 21-23.

goodwill of the majority and democratic justice.¹

Yet not long after Independence, voices might be heard in Malawi that the people of Malawi never wanted a Bill of Rights. It was a British idea, a regrettable one at that, bearing in mind that the British Parliament is sovereign; it was indefensible to deny to others their right to a Parliament as sovereign as in Britain. This point of view appeared to have won the day when the proposed changes in the Constitution for a republic did not provide for a Bill of Rights,² but they appeared in the Constitution after all in the form of particularised specification.³

Therefore, the clauses of Bills of Rights in Commonwealth African are fairly uniform and such variations as are found have been dictated either by local conditions or by drafting improvements.

Perhaps it is noteworthy to mention here certain of these distinctive variations. The right to property is accorded better protection in Kenya, Uganda, Zambia and in Malawi is one of the rights specifically mentioned. In Nigeria, compulsory acquisition of property is allowed provided adequate compensation is paid and any person claiming interest in the property has access to the Court for the determination of his interest or amount of compensation. This right cannot be derogated during an emergency under the specific constitutional provisions but presumably under the general provision⁴ it may. In those other

1. Ibid. at p. 8

2. Times October 18, 1965.

3. Malawi Constitution 1966 - Sec. 2(1) (i-iii).

4. Provided that the measure is "reasonably justifiable in a democratic society." Constitution of Federal Republic of Nigeria 1963. S. 27.

countries, compulsory acquisition is not permitted unless the acquisition is "necessary in the interest of defence, public safety, public order, public morality, health, town and country planning or the development and utilisation of any property in such manner as to promote public benefit" and the necessity must be such as to afford reasonable justification for the causing of any hardship that may result to any person having an interest in the property.

Also, as is not the case in Nigeria, provisions designed to safeguard equality of treatment in all the Constitutions prohibit discrimination on the grounds of, inter alia, race.

The 1950 Constitution of the old Gold Coast prohibited racial discrimination¹ but this was repealed by the 1954 Constitution.² It re-appeared in the Independence Constitution of 1957³ which further protected the freedom of conscience, while also regulating the procedure for compulsory acquisition of property for which adequate compensation must be paid. These clauses were specifically entrenched though a year later the Constitution (Repeal of Restrictions) Act removed these entrenchment provisions. The explanation was that it was desirable that the Parliament of Ghana should be sovereign. The Prime Minister at the time (Mr. Kwame Nkrumah as he then was) intervened in the debate to say that the rigid independence Constitution had been accepted with the greatest misgivings and only to avoid undue delay in the grant of independence.⁴

1. S. 1. 1950 No. 2094. S. 50.

2. S. 1. 1954 No. 551 S. 36

3. S. 3(2).

4. Cited by Rubin and Murray, The Constitution and Government of Ghana (2nd Edn.) p. 8 Parliamentary Debates Official Report Vol. 12 p. 5.

The Republican Constitution of 1960 true to design did not contain a Bill of Rights but Art. 13(1) provides that immediately after his assumption of office, the President shall make a solemn declaration before the people to uphold certain fundamental principles, most of which do not pretend to accord specific personal rights to the individual.¹

The precise legal force of this Declaration was in issue in Re Akoto and Ors.² The appellants were detainees under the Preventive Detention Act, 1958 who had applied unsuccessfully for habeas corpus. The Court ~~had~~ held that the President's satisfaction required by the Preventive Detention Act would not be reviewed. One of the grounds of their application was that

1. "That freedom and justice should be honoured and maintained
"That the Union of Africa should be striven for by every lawful means and when attained, should be faithfully preserved.
"That the Independence of Ghana should not be surrendered or diminished on any grounds other than the furtherance of African Unity.
"That no person should suffer discrimination on grounds of sex, race, tribe, religion or political belief.
"That Chieftaincy in Ghana should be guaranteed and preserved.
"That every citizen of Ghana should receive his fair share of the produce yielded by the development of the country.
"That subject to such restrictions as may be necessary for preserving public order, morality or health, no person should be deprived of freedom of religion or speech, of the right to move and assemble without hinderance or of the right of access to Courts of Law.
"That no person should be deprived of his property save where the public interest so requires and the law so provides."

2. (1961) G. L. R. 523.

Art. 13(1) of the Constitution was contravened by the detention law. The Supreme Court held that the contention that the Preventive Detention Act was invalid because it was repugnant to Article 13(1) of the Constitution was misconceived. The Court likened the Presidential declaration to the Coronation oath taken by the Queen of England during the Coronation service. The Court went on:

"In our view the declaration merely represents the good to which every President must pledge himself to attempt to achieve. It does not represent a legal obligation which can be enforced by the Courts The declaration, however, imposes on every President a moral obligation and provides a political yardstick by which the conduct of the Head of the State can be measured by the electorate."¹

The position in Ghana seems to be that since the President was not bound by any legal obligation to uphold any rights of the individual citizen at any time, he was even less likely to be restricted during an emergency. For even in Nigeria, where fundamental rights are entrenched, it is accepted that they may be affected during an emergency. The contention in the case of Williams v. Majekodunmi,² was that the only emergency power laws capable of over-riding relevant fundamental guarantees which Parliament could make were those otherwise solely within Region power, and in so far as Parliament made laws during an emergency which it could make in any event, these would be subject to all the fundamental guarantees. The opinion of the Court expressed by Bairaman F. J. was that:

"If Parliament can make a law which restricts movement at all time, it can make one which restricts movement only during periods of emergency: for the greater includes the less."³

1. (1961) G. L. R. 523

2. (1962) 1 All N. L. R. 324

3. (1962) 1 All N. L. R. at 324.

The Military Coup d'etat did not affect this position either in Ghana or Nigeria because the military governments promulgated a number of decrees which infringed on the fundamental rights. In any case, the period of military government may be legally regarded as a period of emergency whether declared or not.

Ghana's declaration may be usefully compared with Tanzania's Constitution. The latter recites the rights of the individual and the duties of the state and goes on to claim that:

"such rights are best maintained and such duties equitably disposed of in a democratic society where the government is responsible to a freely elected Parliament and where the Courts of law are free and impartial."¹

However, as Britain demonstrates, the absence of a Bill of Rights is not fatal to the observance of the rights of the individual as long as it is recognised that the right to liberty of the citizen must be protected and cannot be arbitrarily withdrawn from him.

The State demands protection for its very existence and for the orderly functioning of its institutions, such as the Courts of Law, the Legislature and the organs of Government. It also requires that the individual shall not abuse his own liberties at the expense of the liberties of his fellow citizens. The issue is how to reconcile the idea of personal liberty of the subject with the need for the preservation of the State.

Personal liberty is defined as the freedom of every law-abiding citizen to think what he will, say what he will, and to go where he will on his lawful occasions without let or hindrance from any other persons.¹

This is true in normal times but obviously an exception to this rule must be made in times of emergency. Hence all the

1. See Lord Denning: Freedom under the Law (1949) p. 5

Constitutions of the African countries under consideration, contain provision for derogation from certain of these fundamental human rights during periods of emergency.

The rights and freedoms guaranteed are in most part declaratory of existing rights and privileges. They include the right to life, freedom from torture and inhuman treatment, slavery and forced labour, right to personal freedom, to be informed promptly of reasons for arrest or detention or to be brought to trial without delay, to a fair hearing in the determination of civil rights and obligations, to be presumed on a criminal charge innocent until proved guilty, to be informed promptly and in detail of the nature of alleged offence, to adequate time and facilities, to defence personally or by legal representatives, to examine witnesses called by prosecution, to private life and family life, freedom of thought and conscience, freedom of movement, freedom from discrimination based on tribe, place of origin, religion or political opinion and right to property, freedom of expression and of association.

The main concern of this study is, therefore, which of these rights can be derogated from during an emergency, and the efficiency of these rights in safeguarding the liberties of the individual in these countries during an emergency.

Section 29 of the Nigerian Constitution provides for derogation of certain fundamental rights during a period of emergency. It states:

"(1) An Act of Parliament shall not be invalid by reason only that it provides for the taking, during periods of emergency, of measures that derogates from the provisions of section 18, 21, 22 or 28 of this Constitution, but no such measures shall be taken in pursuance of any such Act during any period of emergency save to the extent that those

measures are reasonably justifiable for the purpose of dealing with the situation that exists during that period of emergency.

Provided that nothing in this section shall authorise any derogation from the provisions of section 18 of this Constitution except in respect of deaths resulting from acts of war or any derogation from the provisions of sub-section (7) of section 22 of this Constitution."

The rights which can be derogated during an emergency, therefore, are, the right to personal liberty, the freedom from discrimination, the right of access to the Courts and the right to life, provided, however, that such measures as are taken are reasonably justifiable for the purpose of dealing with the particular situation.

It must be borne in mind that all other rights¹ not provided for derogation during an emergency period are already caught in the provision that nothing shall invalidate any law that is reasonably justifiable in a democratic society in the interest of public defence, health and law and order. Undoubtedly, with regard to these rights measures reasonably justifiable may be adopted without even the necessity of a formal declaration of a state of emergency.² Consequently it would seem that in Nigeria, only the right to protection from inhuman treatment and slavery³ are safeguarded from violation during an emergency or under the pretext of one. -
~~End of Document~~

1. Sections 23 - 27. Constitution of Federal Republic of Nigeria, 1963.

2. Cf. Chike Obi v. D. P. P. (1961) 1 All N.L.R. 182.

3. Sections 19 and 20.

As in Nigeria, so in all the other countries under consideration. In Kenya, it is provided that:

"Nothing contained in or done under the authority of an Act of Parliament shall be held to be inconsistent with or in contravention of section 16, section 20, section 23, section 24, section 25 or section 26 of this Constitution when Kenya is at war, and nothing contained in or done under the authority of any provision of Part III of the Preservation of Public Security Act shall be held to be inconsistent with or in contravention of those sections of this constitution when and in so far as the provision is in operation by virtue of an Order made under Section 29 of this Constitution."¹

Thus, right to personal liberty, freedom of movement, freedom of association and assembly, freedom from discrimination, freedom of expression and the right not to be subjected to search of person or property are not inviolate during a period of emergency. Although there is no provision of reasonable justifiability to the power of derogation given in the above mentioned section, all the individual sections themselves contain the proviso that they can only be derogated by measures which are reasonably justifiable in a democratic society. Since a measure which may be reasonably justifiable in a democratic society may not necessarily be referable to a particular situation, it would seem that a measure introduced during an emergency need not be particularly necessary for the purpose of dealing with the emergency at the material time. Of course, it is quite possible that the framers of the Constitution have deliberately left out any restriction in sub-section 1 of section 27

1. Sec.27(1) Kenya Constitution 1964 as amended by 18/1966. See now Sec.83 of the Constitution of Republic of Kenya which re-enacts the previous provision.

in order to allow any measures whatever to be taken, subject only in any emergency under the Preservation of Public Security Act to the provisions of that Act. The latter appears to be the position because derogation of the rights under each section by reference to conditions specified in the sections do not necessarily coincide with the existence of a declaration of a State of Public Emergency. It seems that all that is required is that the derogation is reasonably required in the interest of defence, public safety order, and health.¹

The Constitution of Uganda, 1967,² in Article 21(5) provides that, "nothing contained in or done under the authority of an Act of Parliament shall be held to be inconsistent with or in contravention of article 10, 15, 19 or 20 of this Constitution to the extent that the Act authorises the taking during any period when Uganda is at war or any period when a declaration of a state of public emergency under this article is in force, of measures that are necessary for the purpose of dealing with the situation that exists during that period:

Provided that the provisions of this clause shall not apply in relation to anything contained in or done under the authority of any instrument having the force of law that is made under the provisions of an Act of Parliament, during a period when a declaration of a state of public emergency is in force by virtue of a resolution of the National Assembly, unless the Assembly has, by a like resolution, affirmed that that instrument shall have effect during that period."

-
1. Cf. e.g. Sec. 24(2) which allows freedom of assembly and association to be derogated provided that the law "is reasonably required in the interests of defence etc."
 2. This replaces the 1966 Constitution - Art. 145 of 1966 Constitution provided that it may be replaced by another Constitution enacted by the National Assembly. Chap. III contains the fundamental human rights provisions. The Constitution came into force on September 8, 1967.

The sections referred to by this provision deal with protection from discrimination, protection of freedom of movement, the right to secure protection of law and the right to personal liberty. Uganda too, has deviated from the usual 'reasonably justifiable' clause and now prefers that the measures be merely "necessary" for the purpose of dealing with the situation that exists. This term it is submitted is even more vague and much more extensive than "reasonably justifiable" for what is necessary may be more than may be reasonable. It is true that under the normal ordinary law, the defence of necessity has always been subjected to the test of reasonableness but it is not too difficult to imagine occasions when an act or measure which is unreasonable might be necessary.

In Zambia, the Constitution makes provision for derogation from fundamental rights and freedom during a period of emergency. It provides,¹ that "(b) Nothing contained in or done under the authority of an Act of Parliament shall be held to be inconsistent with or in contravention of Section 15 or 25 of this Constitution to the extent that the Act authorises the taking, during any period when the Republic is at war or any period when a declaration under Section 29 of this Constitution² is in force, of measures that are reasonably justifiable for the purpose of dealing with the situation that exists during that period."

This provision which is in terms similar to the Nigerian provision allows derogation from the right to be protected from discrimination on the grounds of race, tribe, origin etc. and the right to personal liberty by measures which are reasonably justifiable in the circumstances.

1. Sec. 26(1) Constitution of Zambia 1964.

2. Sec. 29 relates to declaration of emergency.

Neither the Constitutions of Malawi nor Tanzania have constitutionally guaranteed fundamental human rights. In Tanzania, provision for human rights is contained in the pre-amble which reads in part:

"Where freedom, justice, fraternity and concord are founded upon the recognition of the equality of all men and of their inherent dignity and upon the recognition of the rights of all men to protection of life, liberty and property, to freedom of association, to participate in their own government and receive a just return for their labours.

"Whereas such rights are best maintained and protected and such duties are most equitably disposed in a democratic society where the government is responsible to a freely elected Parliament representative of the People and where the Courts of law are free and impartial."¹

Hence it was not considered necessary to have these rights specifically entrenched by the Constitution and it therefore followed that there was no necessity for particular provisions specifying the occasions when fundamental rights may be adversely affected by authorised legislation. In fact, unlike Ghana, the President is not even required to subscribe to a particular oath to uphold civil liberties. He need only take and subscribe to "such oath as may be prescribed by Parliament for the due execution of his office."²

Malawi resembles Ghana more in this respect that its Constitution lists the fundamental principles of Government on which the "Government of the Republic shall be founded"³, inter

1. Preamble Interim Constitution of the United Republic of Tanzania 1965.

2. Section 8.

3. Section 2(1) Republic of Malawi Constitution 1966.

alia that:

"(iii) The Government and the People of Malawi shall continue to recognise the sanctity of the personal liberties enshrined in the United Nations Universal Declaration of Human Rights, and of adherence to the law of Nations.

(iv) No person shall be deprived of his property without payment of fair compensation and only where the public interest so requires.

(v) All persons regardless of colour, race or creed should enjoy equal rights and freedoms."

This declaration of principles is, however, not absolute for it is provided that,

"Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of sub-section (1) to the extent that the law in question is reasonably required in the interests of defence, public safety and public order."¹

There is no doubt that should any measure be challenged in Malawi on the ground that it violates any of the "principles of Government", the chances of its success must depend solely on whether such a measure is 'reasonably required' in the circumstances. There is little to distinguish what may be 'reasonably justifiable' and what may be 'reasonably required' for a particular situation.

Whilst it is not proposed to discuss all the fundamental human rights because this would inevitably take us outside the scope of this study, it is proposed to discuss in greater detail those individual rights which may be adversely affected during a period of emergency so declared.

1. Section 2(2).

The Right of Life:

The sanctity of life is safeguarded by all the Constitutions of the newly independent African States¹ as well as by the Criminal Laws.² Intentionally to take the life of a person is an offence usually capitally punished. However, the State, pursuant to a lawful sentence to that effect, may authorise the taking of life. Death caused in certain circumstances is also excused. For example, provided that no more force than is reasonably required is inflicted, no offence is committed if death occurs in the following circumstances:

- (a) acting in defence of persons or in certain cases of property too;
- (b) preventing the commission of a serious crime;
- (c) preventing a detained person from escaping lawful custody; and
- (d) when effecting an arrest.

It is for the Court to decide the reasonableness of the force used, and in the last exception mentioned, the Court would have regard to the grave nature of the offence for which the arrest was being made as well as the circumstances of its commission.

The Constitutions, however, recognise another exception, that is, death resulting from war.³ It is to be noted that although in all other cases there is no distinction between a war-emergency and any other type of emergency,⁴ yet in

1. E. g. S. 18 Nigerian Constitution 1963.
2. E. g. Ghana Criminal Code 1960 (Act.29) Sections 46-52; Tanzania Penal Code (Cap.16) Sections 196-200.
3. Sec. 29 Nigerian Constitution 1963.
4. Section 70 of Nigerian Constitution 1963. A period of emergency is (a) when the Federation is at war or (b) when there is a resolution of Parliament to that effect.

respect of depriving a citizen of life, this can only be done when the emergency arises as a result of war; which is recognised as the gravest type of emergency. This no doubt clearly indicates that the right to life is regarded as the greatest of all human rights.

The Right to Personal Liberty

All African legal systems within our area of study acknowledge the right of the individual to the liberty and security of his person but usually cases are specified when it shall be legitimate to deprive a citizen of his liberty.¹ The extent of such deprivation is important in that it could easily become arbitrary.

Personal liberty has been defined as "the freedom of every law-abiding citizen to think what he will, to say what he will on his lawful occasions without let or hindrance from any other persons."² In this sense, personal liberty would embrace virtually all the civil liberties, but the personal liberty which can be derogated from during a period of emergency would seem to be much narrower in meaning than the above definition. In its narrow sense, personal liberty, it would seem, is better defined as "the right not to be subjected to imprisonment, arrest and any other physical coercion in any manner that does not admit of legal justification."³ Thus even where deprivation of liberty is allowed, the established procedure must be scrupulously followed.

Arrest: A criminal has to be apprehended and brought to

-
1. Nigerian Constitution Section 21.
 2. Lord Denning op. cit. p. 5.
 3. Dicey, Constitutional Law, (9th Edn.) pp. 207-8.

justice. Therefore, a person who is seen committing or is suspected of having committed a crime may be arrested. In exceptional cases, arrests may also be made if that is the only way of preventing the commission of a criminal offence. But the power of arrest is carefully regulated. Private persons can make arrests in restricted cases; the Police powers of arrest are wider but, even so, they are hedged about.¹ With listed exceptions, every arrest must be supported by a warrant duly signed by a judicial officer, that is, a Magistrate or (very rarely) a Judge. The warrant contains a concise description of the offence charged and names of otherwise describes the person to be arrested. He must be told the cause of his arrest. This rule is relaxed if the arrest occurs during the course of the commission of the crime or when after committing the crime the criminal is pursued and caught, or if the person is arrested while escaping from lawful custody. Another recognised exception is where the arrested person does not make it possible for the person arresting him to give the necessary information as when he assaults the Police Officer making the arrest.²

Pre-trial detention:

A person under arrest must be taken without delay to a police station or any lawful place of detention.³ If he is not formally charged he must be released forthwith. If a charge is preferred against him, he is nevertheless to be taken before a Magistrate within twenty-four hours.⁴ In Tanzania, a

-
1. For Ghana See Part 1 of the Criminal Procedure Code 1960 (Act. 30).
 2. Cf. N'Juma v. Republic of Tanganyika (1964) E.A.L.R. 107.
 3. E. g. Nigerian Constitution S. 21(4)
 4. Nigeria Criminal Procedure Act, 1945 S. 9.

"Justice of the Peace" (who has full powers of arrest) is enjoined to take persons arrested by him or on his orders before a Magistrate "without unnecessary delay."¹ If, however, no Magistrate is available, he could remand persons arrested in prison, lock-up or other place of security for a reasonable time up to a maximum of seven days.²

Until an accused has been proved guilty, his innocence is presumed. It would not be fair, therefore, to confine him pending the determination of his case, unless there are strong reasons why he should be so restrained. Bail has been instituted to cover this situation. In the African states as in Britain, bail is discretionary for all offences.³ A Judge of the High Court alone grants bail for an offence punishable by death. For a felony, a Magistrate may admit the accused to bail if he thinks fit; for any other offence, bail must be granted unless the Court sees good reasons to the contrary. The law appears to contemplate ready admission to bail for less serious crimes. In practice, however, police convenience is often placed above personal liberty. Bail reasonably issue unless the accused is likely to interfere with the course of justice as by influencing and corrupting witnesses or if he is likely to fail to appear at his trial. In any case, the law requires that a trial must be held within a reasonable time but there is also a consolation for the victim in that he is entitled to compensation for unlawful detention.⁴

1. Magistrate Courts Act 1963 S. 43.

2. Ibid. S. 50(5).

3. Nigeria Criminal Procedure Act S. 118.

4. See Report of the Royal Commission on Nyasaland - Devlin Report Cmnd. 814 p. 92.

Imprisonment following conviction for an offence known to the law creates no problem, because then it would be in a manner that "admits of legal justification."

All these procedural safeguard as well as any substantive safeguards of personal liberty are, however, over-ridden in periods of emergency. The absolute right of personal liberty, subject only to legally accepted exceptions already discussed above, becomes restricted by the necessity for safeguarding the interests of the State. The greatest threat to personal liberty arises, therefore, when the executive exercises the power to arrest, detain or restrict people during periods of emergency. Emergency allows arrest without the necessity of informing the person arrested of the reasons for his arrest. Emergency allows detention where no offence can be proved to have been committed, and preventive detention has become in the newly independent African countries a popular measure taken by the Government, sometimes in genuine cases of emergency and sometimes under the pretext that an emergency exist.

Preventive Detention

The power to detain and thus restrict the right to personal liberty is not usually preceded by a judicial inquiry and in many cases, the Courts are precluded from reviewing the executive order imposing the detention. Thus the Executive must in the last resort determine how far it is prepared to allow the right to personal liberty to be inviolate. Thus in Nigeria during the Western Region Emergency 1963, the Administrator appointed by the Federal Government to run the affairs of the Region was invested with unprecedented powers which included authority to detain persons who, to the Administrator's satisfaction, had been concerned in acts prejudicial to the public safety or in the instigation of such

acts.¹ Pursuant to the grant of power, the Administrator ordered the restriction of movements of certain personalities to a defined area of the Region. Chief Williams, one of the persons on whom a restriction order was served, challenged the order as being in contravention of his right to personal liberty under the fundamental rights provision of the Constitution.² The Supreme Court was in no doubt that the fundamental rights guaranteed by the Constitution of the Federation may be invaded for the sake of public interest during an emergency,³ just as it was not in doubt that once a state of emergency is declared, it is the duty of the Government to look after the peace and security of the state: a very strong case is therefore, required for the Court to enjoin the State or its agencies from enforcing the measures adopted for the preservation of peace and security during such emergency.⁴

The threat to personal liberty during periods of emergency has long been recognised and decried. In England the executive claimed the right to arrest and imprison persons without trial only in two cases. (1) It was claimed in assertion of the prerogative right and (2) It was exercised under powers delegated to the Executive by Parliament.

-
1. Reg. 2 Emergency Powers (Detention of Persons) Regulation 1962.
 2. Section 26. Williams v. Majekodunmi (1962) 1 All N.L.R. 413
 3. Ibid. p. 421.
 4. See Williams v. Majekodunmi (3) (1962) 1 All N.L.R. at 336. Adegbenro v. Attorney-General for Federation (1962) 1 All N. L. R 338.

The exercise of the prerogative right was challenged in the case of the Five Knights,¹ when the Court held that, although if a cause has been stated, it could examine whether it was sufficient, and free the prisoner if it was not; if no cause at all was stated, other than the King's Special Command, then the subject had no redress. The prisoners were, however, released in 1628. When Parliament opened, Coke introduced a Bill to make it unlawful to detain any person in prison for more than three months without trial. In the debate that ensued, the right of the subject to be immune from detention without being charged with an offence according to law and being found guilty was emphatically re-affirmed. The Bill of Rights contains a similar affirmation.

In spite of these affirmations, in practice, during times of emergency, persons were detained without trial. Prior to the First World War this was done by suspending the Habeas Corpus Acts for a short time. In Blackstone's opinion these Habeas Corpus Suspension Acts were the only proper way of proceeding in a national emergency. The Coercion Act of 1881, which gave the Irish Executive an absolute power of arbitrary and preventive arrest and power to detain in prison any person arrested on suspicion for the entire period during which the Act remained in force, served as a model for the Executive in England to assume powers during the two World Wars.

During World War II, the Emergency Powers (Defence) Act, 1939 gave powers under which the Executive prepared Reg. 18B.² In Liversidge v. Anderson,³ the House of Lords had to

-
1. 3 State Trials 1. (1627).
 2. Reg. 18B provided power of detention "If the Secretary of State has reasonable cause to believe."
 3. (1942) A. C. 206.

consider the scope and meaning of the Regulation, and it was said:

"The language of the Act of 1939 shows beyond a doubt that Defence Regulations may be made which must deprive the subject "whose detention appears to the Secretary of State to be expedient in the interest of public safety" of all his liberty of movement while the regulations remain in force."

It was contended that the regulation ought to be read with a limitation in favour of liberty, but the Judges refused to limit the natural meaning of the words.¹

The recognition of the power of the executive to detain without trial is adequately summarised in Lord Macmillan's words that "The liberty which we so justly extol, is itself the gift of the law of the land and as Magna Carta recognised, may by the law be forfeited or abridged."²

The right to personal liberty essentially rests on the fact that machinery exists under which anybody deprived of his liberty without legal justification can assert his freedom. In all common law system, personal liberty transcend all other liberties. A reflection of this sentiment is exemplified in the Court procedure which Lord Denning instanced:³

"Whenever one of the King's Judges take his seat, there is one application which by long tradition has priority over all others. Counsel has but to say, 'My Lord, I have an application which concerns the liberty of the subject' and forthwith the Judge will put all other matters aside and hear it This is of course only a matter of procedure, but the English law respecting the freedom of the individual

1. Ibid at p. 219 per Lord Maugham. The decision has since been subjected to various criticisms both academic and judicial. For some of the opinion see Chap.6 Judicial safeguards to Emergency Powers and Nakudda Ali v. Jayaratne [1951/A.C.66 Privy Council decision.
2. (1942) A. C. 206 at p. 261.
3. Freedom under the Law (1949) p. 2.

has been built up from the procedure of the Courts: and this simple instance of priority in point of time contains within it the fundamental principle that where there is a conflict between the freedom of the individual and any other rights or interests then no matter how great or how powerful those others may be, the freedom of the humblest citizen shall prevail over it."

This sentiment is no less true of the African countries within this particular area of study by virtue of their common law heritage. Application for securing personal liberty usually take the form of a motion for a writ of habeas corpus as provided by the Habeas Corpus Acts 1862.¹ The writ of habeas corpus ensures the prompt release of one who has been unlawfully detained by another, be the latter an ordinary subject or a Secretary of State.² Thus, the writ of habeas corpus is the most effectual protection of the liberty of the person,³ but as we have already mentioned, it may not be available to a detainee during an emergency, not necessarily because the Habeas Corpus Acts are suspended but usually, because the Courts find that they have been effectively precluded from reviewing the exercise of Executive discretion.

Freedom from Discrimination

Discriminatory treatment is defined⁴ as "affording treatment to different persons attributable wholly or in part to their respective descriptions by race, tribe, place of origin, political opinions, colour, or creed whereby persons of such

1. 25 & 26 Vict. C. 20.

2. Act of State is no defence. Cf. R. v. Earl of Gwe ex Parte Sekgome (1910) 2 K.B. 576.

3. Cf. Holdsworth 10 H.E.L. p. 658.

4. Zambian Constitution S. 25(3).

description are subjected to disabilities or restrictions to which persons of another description are not made subject or accorded privileges which are not accorded to persons of another such description." But given the prevailing conditions in most of the countries under study, a prohibition of this nature, without some qualification, is premature.¹ If on the other hand as is nearly all the cases, this general prohibition is subject to widely worded exceptions, then the result produced would be nearly as good as having no guarantee of non-discrimination at all.

In settled areas, colonial rule had encouraged the compartmentalisation of the society on racial lines and has conferred, in the process, special political, economic and social privileges on minority immigrant sections of the community.² The African rulers are currently engaged in correcting these imbalances. Constitutional provisions which stand in their way are unlikely to be observed in practice.

It is not, of course, in settler areas alone that problems of this nature arise. In areas where tribal differences are acute, e.g. Nigeria, the concept of majority rule may have swept the comparatively less advanced tribes to power. Unless special privileges are conferred on the latter to enable them to catch up with other sections of the community, social harmony, which is the end sought by these non-discrimination provisions may be unattainable.

Thus section 28 of the Nigerian Constitution, for example, after guaranteeing the freedom proceeds to exempt a law which "imposes any disability or restriction or accords any privileges or advantage that having regard to the nature and

1. Cf. de Smith. The new Commonwealth and its Constitutions (1964) p. 135.

2. E. g. KENYA'S Crown Lands Ordinance.

circumstances pertaining to the person to whom it applies is reasonably justifiable in a democratic society." Another exemption clause deals with qualifications which may be prescribed for employment in the services of the State, civil or military.

In East Africa, administrative rather than legislative measures are being taken to correct racial imbalances though the Kenya Government has indicated that if foreign enterprises do not co-operate with the Government in realising its policy, this will be considered.¹ Already in Uganda, Government has struck against Asian monopoly in the cotton trade, by encouraging African co-operative ownership.² The pattern is the same in Kenya and Tanzania.

When the existing unfair imbalances have been removed and if social intercourse is maintained between the races and tribes, as the case may be, the temptation to discriminate would decrease. Only then would it be possible to enact laws prohibiting discrimination with any reasonable hope of success.

In any case, the African Constitutions allow enactments and discretionary exercise of power which causes discrimination during periods of emergency. Hence legislation is enacted and regulations made by which aliens are deported or expelled from the country,³ religious sects are banned,⁴ political opposition parties are wiped out with a stroke of the pen,⁵ and freedom of movement of a particular race is

1. African Socialism Session Paper para. 142.

2. G. Delf, Asians in East Africa (1963) p. 56.

3. Cf. Ghana The Deportation (Othman Larden and Ahmadu Baba) Act, 1957.

4. The banning of the Lumpa sect in Zambia. See Keesing's Archives (1965) July, Col. 20330.

5. As recently happened in Uganda following the attempted assassination of President Milton Obote: Times December 13, 1969.

restricted. On the latter, one may refer back to legislation during pre-independence Kenya when in the wake of the Mau Mau emergency, a curfew order was made which provided that in the area specified and between 7 p.m. and 6 a.m. "every African shall" except in accordance with the terms of a written permit granted by an authorised officer, "remain indoors in the premises in which he normally resides." In the case of Attorney-General v. Katherine Njoroge,¹ one of the grounds of contention was that the order was ultra vires the constitution as it was racially discriminatory. The Court agreed with the contention but held that both the Constitution and the Ordinance² under which the order was made allowed discrimination in the circumstances.

The Right to Protection of Law or "Fair Hearing"

Judicial independence and equality before the law are two aspects of the right to fair trial. Both of them are safeguarded and guaranteed by the Constitution.³ The Rules of substantive law and procedure to ensure fair trial are also laid down by law and must be strictly followed. But other than those attached to the rights of an arrested person, which have already been discussed, the fundamental human rights provision in the Constitution of those countries which have them enumerate other safeguards.

(a) A prompt and speedy trial - this is a first condition of a fair trial. In this respect, all the newly Independent African countries with common law systems provide that a person charged with an offence is entitled to a fair hearing within a reasonable time by a Court.⁴ Does this mean that only

1. (1961) E. A. L. R. 348.

2. The Public Security Ordinance - a transitional emergency type legislation.

3. S. 22 Republican Constitution of Nigeria 1963.

4. S. 22(2) Nigerian Constitution 1963.

the trial has to be promptly initiated or does it also require an expeditious disposition of the case? If the latter, then it is irregular to reserve judgements indefinitely as happen too often in some States. Also joint trials which may unduly prolong a hearing ought to be avoided. On the other hand, an unduly hasty trial is likely to produce unjust results.

(b) The nature of the alleged offence must be clearly stated- This requires that a person can only be charged for a written offence and it also requires that the accused shall be informed as soon as reasonably practicable in a language that he understands and in sufficient detail, the nature of the charge which he has been called upon to answer. The Criminal Codes of most of the Nations provide for this.¹

(c) Presumption of Innocence - That any person who is charged with a criminal offence is, unless he pleads guilty, presumed innocent until his guilt has been established.² But a proviso is always made that the principle is not thereby infringed to the extent that a law imposes upon a person charged with a criminal offence the burden of proving the particular facts. It is arguable if this proviso has not virtually swallowed the principle it qualifies. A number of recent statutes in Africa would appear to exemplify the proviso rather than the principle.

(d) Right to legal representation - Here the problem is not so much that the accused may be unable to afford legal representation but how far should an accused person be able to insist on a particular legal practitioner to defend him. In theory, all the African states within scope of this study regard the right of an accused person to be defended by Counsel of his choice as fundamental, though the right is subject to the over-riding interest of the State, and even more so during a

1. Criminal Procedure Code Section 386 of Nigeria.

2. Nigerian Constitution 1963 Section 22(4).

period of emergency. Thus in Nigeria, it has been held that a trial is vitiated when an accused person is not afforded sufficient time to secure the attendance of his Counsel.¹

On the other hand in Awolowo v. Minister of Internal Affairs, the Lagos High Court decided that the right to a legal practitioner of one's choice protected by the Constitution contemplates the instruction of a legal practitioner "not under a disability of any kind." If outside Nigeria, he must be one who can enter the country as of right and (needless to add) he must be one who is enrolled to practice in the country.²

The first of these two conditions raised an important issue: ought the Executive to be free to impede the course of justice without satisfying the courts of the bona fides of its action and that the prevailing conditions require the steps being taken?³ In Awolowo's case, the Plaintiff, the leader of the Opposition in the Federal Parliament at the time, was accused of treasonable felony and conspiracy. He had instructed Mr. Grantiaen, Q. C from England for his defence. The latter on arrival at Lagos Airport was denied entry into Nigeria by the Immigration Officials on the orders of the Minister of Internal Affairs pursuant to the power conferred on him by Section 13 of the Immigration Act, 1958⁴. Chief Awolowo contested the validity of the Minister's action and moved the High Court to declare it ultra vires the Constitution. The Court held inter alia that the Minister's action was lawful and its validity could not be impugned on the grounds of malice. The Court, with due respect, ought to have

1. Gokpa v. Police (1961) 1 All N.L.R. 423.

2. (1962) L.L.R. 177.

3. It must be noted that an emergency had been declared in the Western Region and several emergency regulations were in force. In fact it was as a result of the power of search that the evidence on which Chief Awolowo was charged with treasonable felony was alleged to have been found.

4. Cap. 84 See now Immigration Act, 1963.

asked whether there were grounds for the Minister to use the powers conferred on him by statute to stultify the Constitution. However, the Court was of the opinion that "the relevant provision of the Constitution is limited and in my view limited to legal representatives in Nigeria not outside it."¹ The Supreme Court has yet to pronounce on this apparent limitation placed on the accused's guaranteed right to ~~be~~ a Counsel of his choice.

(e) Double jeopardy - No one who has been prosecuted to a final conviction or acquittal should be tried once more on the same facts whether or not for the same offence. This has been written into the African Constitution,² but one qualification is usually made: a superior Court may order a retrial "in the course of appeal or review proceedings relating to the conviction or appeal." But it has not been inviolate. In Ghana, in 1963, five men, including three Senior Ministers,³ were accused of treason and charged before the Special Criminal Division of the High Court. It was provided that the decision of the Court was to be final, though sentences passed were subject to the President's confirmation.⁴

1. per Udoma J. (1962) L.L.R. at p. 185.

2. Uganda 1966 Section 24(5) Zambia Section 20(5).

3. Tawa Adamafio, Minister of Information; Ako Adjei, one time Foreign Minister and Coffie-Crabbe, an executive Secretary of the ruling C. P. P.

4. Criminal Procedure (Amendment) Act 1961 Act 91 but see C. P. (Amendment) Act 1964.

After along trial the Court on December 9, 1963, announced their verdict, the three prominent accused were acquitted because the evidence adduced against them was insufficient to secure conviction. The others were convicted and sentenced to death. The Government's reaction was sharp. President Nkrumah got Parliament to give him special powers¹ to set aside any verdict of the Special Court. Armed with this power, the President set aside the verdict. The retrial of the five men was ordered under a new Act.² They were retried and condemned to death. The President commuted the death sentence to 20 years imprisonment. To pursue political vengeance as Ghana did is an abject violation of the Constitution.

It is appreciated that the verdict in the original trial was tantamount to an indictment of a regime that could lock people up for years without trial, and as the Court showed in this case, without their having committed an offence known to the law. But such a superficial view of the meaning of the Court's decision would be wide off the mark. The decision, however, shows the problem which could create tension between the Executive and Judiciary.

It is, however, provided that no Act of Parliament should be invalid by reason only that it provides for taking of measures which derogate from the provision for fair trial.³ In fact, the idea of an emergency is that there is necessity for quick and immediate action on the part of the executive, this presumes that there can not be time to comply with the conditions of fair trial. As Dicey states, "speedy trial or release of persons charged with crime has been found an incon-

1. Parl. Deb. December 23, 1963. See Criminal Procedure (Amendment) Act 1964 Section 4.

2. C. P. (Amendment) Act Section 4.

3. Section 29 Nigerian Constitution 1963.

convenient or dangerous limitation on the authority of the executive government"¹ during periods of emergency. It is noteworthy, however, to mention here that some of the safeguards to fair trial are specifically attached to the power of detention in some of the Constitutions, for example, in the provision that a detainee shall be informed within a stated number of days of the grounds for his detention.²

Limitation - 'reasonably justifiable'

The extent and scope of the rights which can be derogated from during a period of emergency, it has been seen, is indeed very wide. However, it is provided that any measures taken in derogation from these rights must be "reasonably justifiable for the purpose of dealing with the situation which exists at the time."³ Thus although by conferring upon Parliament not only the power to declare periods of emergency, but also the discretion to determine what laws are required for "peace, order and good government", judicial review as to the constitutionality of such law is excluded, yet the door is left open under the section which allows derogation from fundamental human rights for judicial review of actions taken under such laws. This distinction between the laws and actions taken under them may be subtle, but it is none the less important. Section 29 of the Nigerian Constitution, for example, although providing that no Act of Parliament shall be invalidated which authorises measures that derogate from specified fundamental rights, provides that measures taken under such Acts shall not be taken "save to the extent that these measures are reasonably justifiable for the purpose of dealing with the

1. Constitutional Law (9th Edn.) p. 229

2. Sect. 30 Nigerian Constitution 1963. This point will be discussed in greater detail in Chapter 5.

3. E. g. Sec. 29 Nigerian Constitution, 1963.

situation that exists during that period of emergency."¹ It is thus left to the Courts to review the reasonableness of the measures taken. Another route of judicial review lies in the language of the section. It says that enactments of Parliament shall not be invalidated "by reason only" that they provide for measures that derogate from specified fundamental rights, that is, freedom from discrimination, deprivation of life, personal liberty, and the 'due process' safeguards of fair trial.² Therefore such measures could be invalidated by the Courts on judicial review if they unreasonably derogated from other fundamental rights, such as freedom of conscience, expression and assembly or freedom from inhuman treatment.

The role which the judiciary have assumed in the fundamental rights cases which they have been called upon to decide will be discussed in greater detail later,³ but it is necessary to make a few comments here on their interpretation of the phrase "reasonably justifiable."

In the Liversidge v. Anderson⁴ case, the crux of the decision was the extent of the power of the Home Secretary under Reg. 18B to detain certain classes of persons if he "has reasonable cause to believe" certain things. It might mean that the Secretary of State have such cause of belief regarding the relevant facts as a Court of law would hold sufficient to induce belief in the mind of any ordinary reasonable man. Or it might mean that he must have such cause of belief as he himself deems to be reasonable. In Lord Macmillan's opinion the requirement that a cause of belief shall be reasonable implied a reference to some

1. See also S. 21 Uganda Constitution 1967. Sec. 26 Zambia Constitution 1964.

2. E.g. Sec. 21(5) Uganda Constitution 1967 Sec. 29 Nigerian Constitution 1963.

3. See Chapter 6.

4. (1942) A. C. 206.

standard of reasonableness. By majority decision, the House was satisfied that the standard must be subjective.¹

In interpreting the reasonable justifiability of Executive measures during a period of emergency, the majority of African Courts have adopted the majority view of the Anderson case and have refused to go into the question whether on the matters relied on by the Executive to detain, a reasonable man would have reached the same conclusion. The fact that other phrases have been used notwithstanding. Their opinion is that it matters little what words are used. The question is whether the legislature intended the exercise of such powers to be subject to judicial control.

If the Court recognised its responsibility for determining whether or not the law was "reasonably justifiable", it was imperative for it to discover just what that phrase meant. It is a vague phrase and clearly cannot, without further definition provide the answers to actual cases. Bate J. of the High Court of Northern Nigeria, felt that the standards evolved in India and the United States should serve as a guide.² Those standards lie paraphrased as follows:

"(1) There is a presumption that the Legislature has acted constitutionally and that the laws which they have passed are necessary and reasonably justifiable.

1. (1942) A. C. at p. 248.

2. In Olawoyin v. Attorney-General for Northern Nigeria (1960) N.R.N.L.R. he set out to find some standard by which to judge whether or not any legislation is 'reasonably justifiable'. At the time the case was decided and in fact, even today, no definite standards have been suggested by which to make this judgement.

(2) A restriction upon a fundamental human right must before it may be considered justifiable.

(a) be necessary in the interest (as in the present case) of public morality or public order and (b) must not be excessive or out of proportion to the object which it is sought to achieve."¹

The presumed constitutionality of the statute places on the plaintiff the burden of proving that the law was not reasonably justifiable. This is a heavy burden to discharge.

The Courts in Nigeria have also gone further to extend this presumption to acts of the executive. "There is a presumption that the Legislature has acted constitutionally and that laws which they have passed are necessary and reasonably justifiable. The same presumption may also apply where the Governor, acting as he is and was bound to do, upon the advice of his Executive Council, makes a legislative order in exercise of powers conferred upon him by the Legislature."²

Professor de Smith³ in analysing the phrase "reasonably justifiable in a democratic society", has mentioned that it is to be noted that in the fundamental rights provisions of the Nigerian Constitution, from which all the other African Constitution derive, there are three standards employed by that chapter for the Courts to follow. Namely -

(a) reasonably justifiable

(b) reasonably justifiable in a democratic society

(c) during a period of emergency, reasonably justifiable for the purpose of dealing with the situation which exists at the time.

1. Ibid at p. 29.

2. per Bate J. In Arzika v. Governor, Northern Nigeria following his own lead in Cheranci v. Cheranci (1961) 1 All N. L. R. at p. 382.

3. Fundamental Rights in the Commonwealth (10) 1 C.L.Q. pp. 83-103.

This, therefore, presumes that the standard in each case must differ. Certainly as the society moves towards moments of great stress, as during a period of emergency, the permissible area of governmental restrictions of individual liberty will increase. It is incontrovertible that the fundamental rights chapter was and is intended to assist in the preservation of a democratic society. But this should not mean that the rights of the individual must be placed at the uncontrolled discretion of the majority in the legislature or the Executive.

There is evidence that the Courts have used the terms interchangeably. For instance, in Williams v. Majekodunmi,¹ the Supreme Court stated that the rights of the individual can be invaded only if it is "essential for the sake of some recognised public interest." Thus the Courts see no magic in the phrase "reasonably justifiable" and adopt the policy which they do for reasons other than the dictates of that vague phrase.

For instance, the High Court of Uganda said,

"The Article provides that an Act of Parliament may authorise the taking, during any period when Uganda is at war or any period when a declaration of a state of emergency is in force, of measures that are reasonably justifiable for the purpose of dealing with the situation which exists during that period. The test applicable therefore must be a subjective one....."²

By following the reasoning in the case of Liversidge v. Anderson,³ the Uganda Court have thus held that the criterion of reasonableness must be subjective as was the decision in Anderson's case even though the phrase involved in the latter case was different.⁴

1. (1962) 1 All N.L.R. 324.

2. Per Udoma C.J. in Ex Parte Matovu (1966) E.A.L.R. 514

3. (1942) A. C. 206.

4. This approach will be criticised later - Chapter 6.

In the last resort perhaps it is not the definition of the phrase which should matter but that "such meagre safeguards as the Constitution has provided against the improper exercise of power must be jealously watched...."¹

C O M M E N T S

One of the most important aspects of the relationship between the State and the individual concerns the extent to which personal freedom is curtailed in the interest of the security of the state whether in its institutional aspect or viewed as a collection of individuals.

Internal disturbances arising from riots as well as from other causes could quite reasonably justify the proclamation of an emergency and the promotion of measures which might seriously derogate from the fundamental liberties of the subject. External aggression upon a State certainly justifies an even more drastic curtailment of individual rights in the interest of State Security.² So in England during the two World Wars. Defence Regulation 18B made pursuant to the enactment of Emergency Powers (Defence) Act. 1939 empowered the Secretary of State to detain without trial certain specified classes of persons and the Courts held on several occasions that this power of the Secretary of States could not be subjected to judicial control.³ Lord Denning commenting on the decision in Anderson's case stressed that "this wartime exception must not be allowed to be introduced into (this) country in time of peace or at all events only in the gravest emergency."⁴

-
1. Cf. Indian Supreme Court in Ram Krishna v. State of Delhi (1935) S.C. 318 at p. 329.
 2. Oagos Conference on the Rule of Law (1961) Report p. 16.
 3. Cf. e.g. Liversidge v. Anderson (1942) A.C. 206 Greene v. Secretary of State (1941) 3 All E. R. 370.
 4. Freedom Under the Law (1949) p. 5.

However, once this exception is accepted, differences of opinion over the necessity of extensive arbitrary powers to curtail personal liberty are bound to arise. It may be agreed that emergency curtailment of fundamental rights may be inevitable, but it has been¹ seen that an emergency can be real or imagined or it can be used to bolster up the use of naked force. Preventive detention may be necessary in conditions of anarchy and violent sectionalism within a state at certain times but it could all too easily degenerate into instruments of tyranny or oppression.

Once a declaration of emergency is made in accordance with constitutional provisions, the power of the Court, it would seem, is limited to determining whether measures taken pursuant to the declaration are reasonably justifiable to deal with the situation. Since certain fundamental rights could be taken away completely and others more severely restricted during such times, and since it is conceivable that a declaration might be made even when, *prima facie*, emergency conditions do not appear to exist, it could then be argued that the lack of judicial review or its limited scope, constitutes a very serious threat to the guaranteed rights and to this extent objectionable.²

There is some force in this argument but it must be realised that constitutional affirmation of fundamental rights has value only on the assumption that those who are to operate them intend to proceed on democratic lines. Without such assumption it might be almost impossible to devise a reasonably workable system of government: should the Government lack such an intention, however, no amount of safeguard

1. See Chapter 3.

2. See Holland: "Human Rights in Nigeria" (1962) 15
C. L. P. p. 157.

could stop such a government if it were intent on abandoning democratic courses.

There is danger, however, when the citizenry, whether by legislative or executive abuse of power, are made to live as if in a perpetual state of emergency. It is to prevent this that the executive is required to justify its measures and actions. Parliament may be expected to have regard for the liberties of the individual. The democratic but slow process of the Court may not be appropriate in a situation in which the lawfully constituted authority of the State is threatened with subversion or grave civil disorder, and it might be unrealistic to suppose that Courts would be entrusted with the extra legal exercise of determining when an emergency arises sufficient to warrant the use of restrictive measures. Nevertheless, the Courts could always be the ultimate judge of whether or not the individual's liberties have been infringed.

The State would go to any lengths to safeguard itself whenever its safety is endangered and restrictive measures which infringe on the rights of the citizen may be necessary but it should also be reasonable for it must be assumed that all human beings desire to lead peaceful lives and the Government must respect this desire and to this extent limit its power.

CHAPTER FIVE

THE JUDICIARY AND EMERGENCY POWERS

In a State with a written Constitution, as are all the African States within this area of study, the Constitution declares itself not only to be Law but the over-riding supreme law. It is, therefore, an implication of judicial function, in peace as in war, that the Courts have power, where the Constitution and the ordinary law are both applicable to any case before them to decide whether the latter is inconsistent with the former.

The power of judicial review, in this context, means the solemn duty entrusted to the Courts to interpret the Constitution and decide whether in a particular case the legal restraints placed upon the legislative and executive organs of Government have been transgressed.

All the countries within this area of study have provided in their Constitutions¹ that in the determination of his civil rights and obligations a person shall be entitled to a fair hearing within a reasonable time by a Court or other Tribunal established by law and constituted in such manner as to secure its independence and impartiality. Furthermore, there is provision that any citizen or person who feels aggrieved as a result of the infringement of any of the fundamental rights may move the Supreme Court or any of the High Courts. These provisions provide, therefore, the means of enforcing the fundamental rights and have made the Judiciary the guardians of the citizen's liberty and privileges.

-
1. E.g of S. 22 - Constitution of the Federal Republic of Nigeria, 1963.

It is recognised, however, that it is possible and perhaps necessary to suspend or at least limit the scope of judicial review during a period of emergency. Experience taught the British that there was no need to enact a Special Habeas Corpus Suspension Act, because the same effect could be achieved by careful legislative drafting. Whilst some of the newly independent African States in the Commonwealth have borrowed from the British experience, some have preferred to be more specific. Thus for example, the Republican Constitution of Malawi, 1966, denied the Courts in Malawi power to review the constitutionality of legislation. The White Paper on the Constitution stated¹ that it should not be function of a Judge "To question or obstruct the policies of the Executive Government, but to ascertain the purposes of those policies by reference to the laws made by Parliament and fairly and impartially give effect to those purposes in the Courts when required to do so."

In providing for emergency, the Constitutions of the African States by and large have left the ultimate responsibility of declaring a state of public emergency with the Legislative Assembly, whether it is called Parliament or National Assembly. The assumption is, therefore, that there should be no problem in this regard. But it has been suggested² that the judiciary should have the power to enquire into the factual situation at the material time to determine whether, in fact, such a declaration is justified. Although the question may now be considered as settled by the Courts themselves - they had held³

1. Paragraph 29.

2. Naish, "Some legal Aspects of Emergency" in The Lawyer, a University of Lagos Law Society Publication (1963) Vol.1 No. 1. Also the argument of the Plaintiff's Counsel in Adegbenro v. Attorney-General for the Federation (1962) 1. A. N. L. R. 324.

3. See Adegbenro v. Attorney-General for the Federation (1962) 1. A. N. L. R. 324.

that the Court will not go behind a declaration to determine its justifiability - yet one or two comments need to be made.

If the Courts have to decide whether there is a State of Emergency they will naturally refer to the definition of that term in the Constitution, and the Constitutional provision being entirely specific, then all that they can do is to discover whether the required procedure for the declaration has been complied with or not. If it has, then they must rule that under the Constitution a period of emergency is in operation whatever their own personal views on the factual situation may be. For example, the Nigerian Constitution provides:

"Sec. 70(3) In this Section "period of emergency"
means any period during which

(a)

(b) there is in force a resolution passed by
each House of Parliament declaring that a
State of Public Emergency exists".¹

as in the case of Kenya, where it is provided that:-

"Sec. 29(2) the President may by proclamation published
in the Gazette declare a State of Public Emergency
(provided that) every such declaration shall lapse at
the expiration of seven days unless it has been in
the meantime approved by a resolution of the other House
supported by the votes of two-thirds of all members of
that House."

These provisions shows that the function of determining whether the situation amounts to an emergency or not is clearly granted by the Constitution to the Executive Government. Any view that would require a different interpretation must necessarily imply after those provisions quoted above some such phrase as "with which resolution the Courts (Supreme or High Courts as the case may be) agrees". Such a supplying of words

1. Constitution of the Federal Republic of Nigeria, 1963.

that are not to be found in an enactment is by no means permissible.

Apart from this, if the Courts are allowed to review such obvious question of pure policy, it is not difficult to imagine a situation where the whole machinery of Government will be thrown into chaos by the uncertainty which will be the outcome of a series of challenges in Court. To permit a non-elected and largely irremovable group of five Judges to enquire into allegations of bad faith - if the suggestion is that Parliament may abuse the procedure - on the part of a majority of the elected representatives of the people must be considered an unacceptable principle of democracy and in direct conflict with the system of Parliamentary Government.

It has been seen¹ that constitutionally guaranteed Bill of Rights are erroneously weakened unless there exists provision for their effective enforcement, particularly during a period of emergency when the State in the interest of its own security has to limit the freedom of the citizen. The insertion of these rights in the Constitution and the guarantee of their enforcement by the prerogative writs imply judicial review and control of both the legislative and executive acts and organs of the State. In so far as there has been any encroachment upon the rights not justified by the Constitutional restrictions, the Court will declare the order or statute invalid, unenforceable and unconstitutional. Thus the provisions relating to fundamental rights provide the means by which the judiciary are able to perform their duty as the guardians of liberty.

1. See Chapters 3 and 4.

But while these rights govern and control the absolute power of the State in imposing restriction, they are for the most part qualified and not absolute rights. Thus Parliament may derogate from all of them at any time by measures which are "reasonably justifiable in a democratic society."¹ and during a period of emergency by measures which are 'reasonably justifiable'² (or some similar phrase) for the purpose of dealing with the emergency. This phrase brings the Courts into the picture, for it is they who must balance the rights of the individual against the interest of the community in order to determine if any measure infringing the fundamental rights of the individual is reasonably justifiable or strictly expedient for the purpose for which it was made. The approach of the African Judges to this problem has borrowed a great deal from the British attitude and approach, not surprisingly, and it would therefore be helpful to discuss this approach first.

THE BRITISH APPROACH

During the second World War in Britain, the Emergency Powers (Defence) Act, 1939, empowered His Majesty to make by Order-in-Council regulations which appeared to him to be necessary or expedient for the public safety, the defence of the realm, the maintenance of public order, the efficient prosecution of any war in which His Majesty might be engaged and the maintenance of supplies and services essential for the life of the Community. The Act specified a number of purposes for which regulations could be made without prejudice to the generality of the above-mentioned purposes. Pursuant to this, several regulations were made, inter alia, the controversial Regulation 18B of the Defence (General) Regulations, 1939.

1. E. g. of S. 27 Uganda Constitution 1960.

2. E. g. S.29(1) Nigerian Constitution 1963.

The Regulation provided that "if the Secretary of State has reasonable cause to believe any person to be of hostile origin or association he may make an Order against that person directing that he be detained." Sir John Anderson, the Secretary of State for Home Affairs acting in good faith issued an Order of detention under the Regulation against Liversidge, who challenged the order. In the case, Liversidge v. Anderson,¹ the House of Lords had to consider the scope and meaning of the Reg. in so far as it affects personal liberty.

Lord Maugham did not consider ~~that~~ the rule that legislation dealing with liberty should be construed in favour of personal liberty. He said:

"The language of the Act of 1939 shows beyond a doubt that Defence Regulations may be made which must deprive the subject 'whose detention appears to the Secretary of State to be expedient in the interest of public safety', of all his liberty of movement while the regulations remain in force. There can plainly be no presumption applicable to a regulation made under this extra-ordinary power that the liberty of the person in question will not be interfered with, and equally no presumption that the detention must not be made to depend on the unchallengeable opinion of the Secretary of State."²

In the opinion of Lord Wright, there was no necessity for subjecting all exercise of discretion to judicial control. He

said:- "All the Courts today, and not least this House, are as jealous as they have ever been in upholding the liberty of the subject. But that liberty is a liberty confined and controlled by law, whether common law or statute. It is, in Burke's words, a

1. (1942) A. C. 206.

2. Ibid. at 219.

regulated freedom it is not an abstract or absolute freedom. Parliament is supreme. It can enact extraordinary powers of interfering with personal liberty. If an Act of Parliament, or a statutory regulation, like Regulation 18B, which has undoubtedly the force of a statute, because there is no suggestion that it is ultra vires or outside the Emergency Powers (Defence) Act, under which it was made, is alleged to limit or curtail the liberty of subject or vest in the executive extraordinary powers of detaining a subject, the only question is what is the precise extent of the powers given.¹ In his opinion the answer to that question could only be found by "scrutinizing the language of the enactment in the light of the circumstances and the general policy and object of the measure."²

The precise extent of the power can only be determined by interpreting the phrase "has reasonable cause to believe." It might mean that the Secretary of State must have such cause of belief regarding the relevant facts as a Court of Law would hold sufficient to induce belief in the mind of the ordinary reasonable man. Or it might mean that he must have such cause of belief as he himself deemed to be reasonable. In Lord Macmillan's opinion the requirement that a cause of belief shall be reasonable implied a reference to some standard of reasonableness. In answering the question whether the standard of reasonableness which must be satisfied was an impersonal standard independent of the Secretary of State's own mind or whether it was the personal standard of what the Secretary of State himself deemed reasonable, his Lordship stated:

"Between these two readings there is a fundamental difference in legal effect. In the former, the reasonable cause which the Secretary of State had for his belief may, if challenged, be examined by a Court of Law in order to determine whether he had such cause of belief as would satisfy the ordinary reasonable man, and to enable the Court to adjudicate on this question there must be disclosed to it

1. Ibid at p. 260-1.

2. Ibid.

the facts and circumstances which the Secretary of State had before arriving at the belief. In the latter case, it is for the Secretary of State alone to decide in the forum of his own conscience whether he has reasonable cause of belief, and he cannot, if he has acted in good faith, be called upon to disclose to anyone the facts and circumstances which have induced his belief or to satisfy anyone but himself that these facts and circumstances constituted a reasonable cause of belief."¹

Viscount Maugham gave four reasons why the action of the Secretary of State should not be subject to the control of the Judge in a Court of Law.²

- (1) It is a matter for executive direction, so the Court cannot interfere to determine the reasonableness of the belief or whether it is necessary to exercise control over the person in question.
- (2) Since the Home Secretary is not acting judicially in such a case, in as much as he can act on hearsay and it is not required to obtain any legal evidence and clearly is not required to summon the person whom he proposes to detain and hear his objection, it would be strange if his decision could be questioned in a Court of Law.
- (3) It is obvious that in many cases, he will be acting on confidential information which could not be communicated to the person detained or disclosed in Court without the greatest risk of prejudicing future efforts of the Secretary in defence of the realm.

1. (1942) A. C. 206 at p. 260.

2. Ibid. at p. 261.

- (4) It is to be noted that the Secretary of State is a member of Government answerable to Parliament.

In Viscount Maugham's very own words:-

"In the absence of a context, the prima facie meaning of such a phrase as 'if A.B. has reasonable cause to belief' a certain thing, it should be construed as meaning 'if there is in fact reasonable cause for believing' that thing and if A.B. believes it. But I am quite unable to take the view that the words could only have that meaning. It seems reasonably clear that if the thing to be believed is something within the knowledge of A.B., or one for the exercise of his exclusive discretion, the words might well mean if A. B. acting on what he thought was reasonable cause (and of-course acting in good faith) believed the thing in question."¹

There could be no review of the constitutionality of the legislation because this is explicit in the language of the Act, as regards the liberty of the individual, the exercise of executive discretion can only be reviewed by the subjective standard of reasonableness.

Thus the House of Lords held that the words clearly indicated that the exercise of executive discretion was not one subject to discussion, criticism and control of a Judge in a Court of Law, particularly in the exigencies of war. Lord Macmillan's words in this behalf are pertinent. He observed:

"In the first place, it is important to have in mind that the regulation in question is a war measure. That is not to say that the Courts ought to adopt in war time canons of construction different from those which they follow in peace-time. The fact that the nation is at war is no justification for any relaxation of the vigilance of the Courts in seeing that the law

1. (1942) A. C. at p. 261.

is fully observed, especially in a matter so fundamental as the liberty of the subject, rather the contrary. But in a time of emergency when the life of the whole nation is at stake it may well be that a regulation for the defence of the realm may quite properly have a meaning which because of its drastic invasion of the liberty of the subject the Courts would be slow to attribute to a peace time measure. The purpose of the regulation is to ensure public safety, and it is right to interpret emergency legislation as to promote rather than to defeat its efficacy for the defence of the realm. That is in accordance with a general rule applicable to the interpretation of all statutes or statutory regulations in peace time as in war time."¹

But Lord Atkin in a strongly worded dissenting judgement, felt the majority of their Lordships were taking a stand of judicial abdication of responsibility by reading an ambiguity into words which he felt were not at all ambiguous. He said,

"It was surely incapable of dispute that the words "If A has X" constituted a condition the essence of which was the existence of X and the having of it by A. The words did not and could not mean "If A thinks that he has" (as suggested by Viscount Maugham). Reasonable excuse for an action or a belief was just as much a positive fact capable of determination by a third party as was a broken ankle or a legal right. That meaning

1. (1942) A. C. 206 at pp. 251 - 252.

of the words had been accepted in innumerable legal decisions for many generations; "reasonable cause for belief" when the subject of legal dispute had been always treated as an objective fact to be proved by one or other party and to be determined by the appropriate tribunal."¹

On the question of the liberty of the individual he said (citing with approval the dictum of Pollock C. B. in Bowditch v. Balchin² which was cited by Lord Wright in Barnard v. Gorman)³

"In a case in which the liberty of the subject is concerned, we cannot go beyond the natural construction of the statute: In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the Judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law. In this case, I have listened to arguments which might have been addressed acceptably to the Court of Kings Bench in times of Charles I; I protest, even if I do it alone, against a strained construction put on words with the effect of giving an uncontrolled Power of imprisonment to the Minister."⁴

1. (1942) A. C. 206 at p. 260.

2. (1850) 5 Ex. 378.

3. (1942) A. C. 378.

4. (1942) A. C. 206 at p. 284.

And then Lord Atkin was forced to add, "I view with apprehension the attitude of Judges who on a more question of construction when face to face with claims involving the liberty of the subject show themselves more executive minded than the executive."¹

One is reminded of the latter statement on reading some of the judgements of the African Courts which have relied heavily on the decision in *Liversidge v. Anderson*² in spite of the spate of criticisms³ which have followed the decision ever since it was handed down, and even in spite of some differences in language between Reg. 18B and equivalent emergency provisions in these countries. There is a particular paucity of case - material on emergency legislation in Africa, however, the few there are show two main trends. The approach which leans in favour of the executive at all cost and that which tries to steer a middle course

-
1. Ibid.
 2. Op. cit.
 3. The Privy Council in Nakkuda Ali v. Jataratne (1951) A.C. 66 at 76.

Lord Radcliffe delivering the judgment of the Privy Council observed: "Indeed it would be a very unfortunate thing if the decision of *Liversidge's* case came to be regarded as laying down any general rule as to the construction of such phrases when they appear in statutory enactment. It is an authority for the proposition that the words "if A.B. has reasonable cause to believe" are capable of meaning "if A.B. honestly thinks that he has reasonable cause to believe" and that in the context and attendant circumstances of Defence Reg. 18B they did in fact mean just that. But the elaborate consideration which the majority of the House gave to the context and circumstances before adopting that construction itself shows that there is no general principle that such words are to be so understood."

whilst not leaning completely in favour of individual freedom at all cost. The first approach is illustrated by the Ugandan decision in the case of Chief Micheal Matovu v. Uganda¹ and also by a series of Ghanaian decisions on preventive decision; and the second approach by the Nigerian tri-partite decisions following the Western Nigeria crisis.

THE UGANDA APPROACH - UGANDA v. COMMISSIONER OF PRISONS
Ex-Parte Matovu

Chief Matovu had been in prison having been arrested under the Deportation Act on May 22, 1966. On July 16, 1966, he was released and ordered to go. Soon thereafter as he stepped out of prison, he was re-arrested and detained. Then on August 10, 1966, acting under the authority vested in him by Regulation 1 of the Emergency Powers (Detention) Regulations, 1966, the Minister of Internal Affairs ordered the detention of the Chief. Among the questions referred to the Constitutional Court was whether the Emergency Powers Act, 1963, and the Emergency Powers (Detention) Reg. 1966, particularly Reg. 1 were ultra vires the Constitution. The main objection to Reg. 1 was that it conferred too wide a discretion.

Article 30(5) of the Constitution permits derogation, which must be contained in or done under the authority of an Act of Parliament, from, inter alia, article 19 (which protects personal liberty) during the time of war or emergency, as are reasonably justifiable for the purpose of dealing with the situation that exists during that period. Offence was taken to section 3 of the Emergency Power Act, 1963 which gave the President power, during an emergency "to make such regulations as appear to him to be necessary or expedient for securing the public safety, the defence of Uganda, rebellion and riot and

1. (1966) E. A. L. R. 514.

for maintaining supplies and services essential to the life of the community." Further he could by regulations "so far as appears to (him) to be necessary or expedient" for the above purposes, "make provision for the detention of persons or the restriction of their movements, and for the deportation and exclusion from Uganda of persons who are not citizens of Uganda." Purporting to act under this provision, he promulgated the Emergency Powers (Detention) Regulation 1966, Sec. 1 of which allows the Minister of Internal Affairs to detain any person if he is satisfied that it was necessary.

The Court over-ruled the objection that this conferred too wide a discretion on the Minister of Internal Affairs. The essence of the objection was that the powers given to the President and the Minister, being unfettered and dependent entirely on their subjective opinion, were in excess of those authorised by the Constitution. It is ~~not~~ clear whether the Court clearly understood the real basis of the objection because it stated that the Minister was answerable to Parliament for his conduct: and that Parliament had entrusted these powers to him. The Court said:¹

"It is noteworthy that these regulations were debated and passed by the National Assembly the membership of which is in the neighbourhood of over 80 (Eighty). It is difficult to see how this Court can by the application of an objective test, which is an operation in the abstract, hold that the powers which over eighty citizens of Uganda, Members of Parliament had considered reasonably

1. [1966] E. A. L.R. 514 at p. 542.

justifiable to be granted to the Minister to enable him to deal with a serious situation in the country, was (sic) not reasonably justifiable in the existing situation."¹

The Court similarly dismissed jurisdiction to review the exercise of these powers by the Minister. It cited Liversidge v. Anderson² with approval, emphasising that the phrase 'reasonably justifiable' can be interpreted only by the subjective standard - For

"To require that every case of detention should go to Parliament and that the Minister should issue his Order for the detention of a person concerned if Parliament had debated the cause and been satisfied would be absurd and would certainly defeat the whole object of the exercise as the Minister has to act on secret information. In any case, such a practice would be inconsistent with and would render the ministerial system of Government a farce."³

Liversidge v. Anderson⁴ strictly speaking, is irrelevant because that decision was merely concerned with the construction of phrase - 'reasonable cause to believe'. The question was whether this meant that a subjective belief of the Minister was enough or whether the Court could examine to see if there existed any or sufficient, evidence to produce that belief. The House of Lords, as already seen, opted for the former construction. In the Uganda case, the question was

¹. /I966_7 E. A. L. R. 514 at 542.

². Op. cit.

³. Ibid at 542.

⁴. Op. cit.

hardly one of constuction. Both the parties appeared to agree that the natural construction was a subjective one -¹ this indeed was the basis of the applicant's complaint.

The Liversidge's case could have been relevant to the decision if the Court had examined it in the context of the constitutional provisions instead of the emergency legislation. It could have been argued that if the House of Lords upheld a subjective view, then the phraseology in the Constitution equally well permitted Parliament to grant powers exerciseable on this subjective belief. It is not clear from the judgement whether the issue was posed in this form. It is doubtful, however, if such a view is correct. In Liversidge, the Regulations did not refer to the belief of the Minister, and 'reasonable cause to believe' could conceivably be held to import his subjective assessment. In Uganda, however, the Constitution provides that the authority that can be conferred on the President was such as 'reasonably justifiable for the purpose of dealing with the situation.' No reference is made to the belief of the President; some objective criteria would seem to be contemplated. If, on the other hand, the Liversidge's case was relevant or cited to show that the subjective test was more desirable, then it ought to be pointed out that the Court was in a minority, in view of the criticisms which have been made on that decision.²

-
1. This construction was the correct one since the wording was "if the Minister is satisfied" as opposed to the British Provision which was, "if he had* reasonable cause to believe".
 2. See ante.

The second issue before the Court was to determine whether any of the provisions of Sec. 31(1) of the Constitution had been contravened in relation to the applicant. Under that Section, whenever a person was detained under emergency powers it was required that "(a) he shall as soon as reasonably practical, and in any case not more than five days after the commencement of his detention, be furnished with a statement in writing in a language which he understands specifying in detail the grounds upon which he is detained, and (b) not more than 14 days after commencement of his detention, a notification shall be published in the Gazette stating that he has been detained and giving particulars of the provision of law under which his detention is authorised and (c) not more than one month after the commencement of his detention and thereafter at intervals of not more than six months, his case shall be reviewed by an independent and impartial Tribunal established by law and presided over by a person appointed by the Chief Justice." The applicant alleged that he was first detained on the 22nd day of May, 1966, purportedly under the provisions of the Deportation Ordinance¹, he was subsequently transferred to Lurira Prison, where he was told that he had been released and re-arrested on 16th July. The detention order was served on him only on August 11, 1966. The Gazette announcement was on 19th August, and the Tribunal heard his case on the 26th August. This Tribunal was alleged not to be independent and impartial as apart from its Chairman who was a Judge, its two other members were District Commissioners, nor, it was argued, was the Tribunal established by law, as required by the Constitution.

1. The Deportation Ordinance was held to be unconstitutional by the Court of Appeal in Ibingira v. Uganda (1966) E. A. 306.

The Court dismissed all but one of these complaints. It held that Matovu's detention did not begin on 16th July, when he was apprehended by the Police. Under S. 3 of the Reg. the police were empowered "to arrest and detain any person who has acted, is about to act or likely to act in a manner prejudicial to the public safety and maintenance of public order for a period not exceeding twenty-eight days." Such detention not being a detention by the Minister, who did not make his Order till 11, August, the day when the detainee was also given reasons for his detention, there was no violation as to the five-days requirement. There is no evidence that the detainee was brought before a Magistrate during his custody by the police and there is no requirement under Section 3 for bringing a person held by the police before a Magistrate. The Court relied on this provision as justifying his detention for 28 days before he was given any reasons or opportunity to present his case to a Tribunal.

There is good reason to believe that section 3 was unconstitutional, at any rate, it is an arguable point. There was no justification for it in the Constitution; a person could either be arrested and detained under the ordinary law, in which case he had to be brought before a Magistrate as soon as possible or under emergency legislation, in which case the provisions of Section 31(1) of the Constitution applied. Police powers under Section 3 of the Regulations clearly came under emergency legislation, and because they disregarded section 31 of the Constitution, they were unconstitutional. The Court did not address itself to this

issue; even if the Counsel had not argued the issue, it is clearly the duty of a Court to do so when the liberty of an individual is at stake. While so much discussion centred on the powers of detention of an exulted Minister, there was no question of the grant of important, though limited, powers to the Police Officer, free from direct control of Parliament or Public Opinion.

The Court also held that the Tribunal was established by law, and was independent and impartial. It was established by the Regulations¹ which had been approved by Parliament in the prescribed manner. As to the complaint of impartiality, the Court "regarded with disfavour the imputation that the other two members of the Tribunal were not independent of the executive influence." They held that there was not a shred of evidence produced before them in support of such a serious allegation:

"One would have thought that the two men concerned, who undoubtedly must have done well in the public service of Uganda to have risen to the Senior Posts of District Commissioners, and who owed their appointment to the Public Service Commission, ought to be regarded as men of integrity and high reputation with independent minds. It would be wrong and unjustified to assume otherwise."²

On the contrary, the presumption might well be that they were not independent; they were executive officers, and as District Commissioners very much concerned with the maintenance of law and order. The Courts have always been anxious to

1. S. 5.

2. (1966) E. A. L. R. 514 at p. 545.

emphasise the maxim that justice should not only be done, but seem to be done. The Court did recommend, however, that the Government employees should be replaced as members of the Tribunal. "Such a change, we believe, would be all to the good and might serve to place the Tribunal, like Ceaser's wife, above suspicion".¹

In one respect only did the Court find fault with the Government. The Constitution, as already noted, prescribes that reasons for detention be given to a detainee. The Government had merely informed Matovu "the grounds on which you are being detained are that you are a person who has acted or is likely to act in a manner prejudicial to the public safety and maintenance of public order." The Court held that the statement appeared to be in a stereotype form and did not provide sufficient details of the reasons for detention, and ordered the Government to supply the details.

Two comments may be made on the manner in which the Court dealt with this issue. Firstly, the Court showed little sympathy or understanding of the Constitutional requirement of detailed reasons:

"It is not clear to us why article 31(1)(a) of the Constitution should have required the Minister to furnish a detainee with a statement in writing specifying in detail the grounds upon which he is detained.

One wonders the extent to which the Minister could go in the specification of the grounds for detaining a person. The Minister of

1. Ibid. at p. 545.

Internal Affairs, in virtue of his ~~im~~position, must of necessity obtain his information through secret and confidential sources. It might not be in the interest of public security that such sources be disclosed."¹

In the next paragraph, the Court does, however, go on to state the obvious, "we do not think that the mere specification of the grounds would necessarily involve the disclosure of the source or sources of information." It is a little surprising that the Court did not appreciate the reasons for the requirement - for there would have been no point in providing a review Tribunal unless the detainee knew what case he had to answer. The giving of reasons, with the subsequent review, is a fundamental part of the scheme for the protection of the detainee.

Secondly, even though the Court found the reasons insufficient it regarded the deficiency as a matter of procedure, not substance, which could be cured. Further, the Court held that it was not a condition precedent but a condition subsequent. Therefore, the Minister's Order of detention was not invalid; it was necessary, however, for him to provide reasons. No time limit within which reasons should be given was laid down by the Court.

It is a little difficult to understand what the Court meant by saying that the deficiency in question was a procedural one, and being a condition subsequent could not be fatal. It is generally accepted that non-compliance with procedural requirements can invalidate an Order, nor does it matter that the requirement is in the nature of a "condition subsequent".

1. (1966) E. A. L. R. at p. 546.

The Indian Supreme Court has been very explicit on this. Under somewhat similar legislation, it has held that failure to communicate the grounds within time makes the detention illegal, entitling the detainee to release.¹

In fact, the best judicial approach in the opinion of the Indian Supreme Court has been characterised by its remark in the decision in the case of Ram Krishna v. State of Delhi², when it stated that:

"Preventive Detention is a serious invasion of personal liberty and such meagre safeguards as the Constitution has provided against the improper exercise of the power must be jealously watched and enforced by the Courts."³

The safeguards in Uganda and indeed in most of the other newly independent countries in Africa are even more meagre than in India, but the Court failed to show any particular concern for a person detained under these special powers. This is indeed a dangerous precedent because similar legislation also prevails in Kenya⁴ and in the new Uganda Constitution.⁵ By it the Government is sanctioned extensive powers, without any effective check even if they are arbitrarily exercised. While the rights of the individual must be subordinated to the greater good of society, there is no reason why the Courts should not make an attempt to examine whether there has been abuse of powers.

1. State of Bombay v. Atmaran (1951) S. C. 157.

2. (1953) S. C. 318.

3. Ibid at p. 329.

4. Art. 27 of the Constitution 1965 (Now 83(2) of 1969 Const.)

5. Art. 21.

That the function of the judiciary as a check on the excessiveness of the executive is bound to generate occasional conflicts between the judiciary and the other arms of Government is not impossible, and therefore the judiciary must exercise some restraint. Clearly cases involving the rights of the individual during a period of emergency are very difficult to resolve. They inevitably involve the Courts in question of policy. A Court must consider the nature of the individual and community interests which are involved. It must examine the degree to which the individual's interest undermines that of THE COMMUNITY and which is the more important. In arriving at a decision upon this last question the Court must consider its relationship to other agencies of Government and to the Police. This will force it to do some thinking about the Government generally and about its position as a non-elected body in a democratic society in particular.

THE NIGERIAN APPROACH

As the Federal Supreme Court of Nigeria said in the case of Chike Obi v. Director of Public Prosecutions,¹ its role is not merely to rubber stamp the acts of the legislature and the executive. The Court must be the arbiter of whether or not any particular law is reasonably justifiable.² Also in the case of Olawoyin v. Attorney-General for Northern Nigeria,³

1. (1961) 1 All N. L. R. 182.

2. Ibid. at p. 196.

3. [1960] N. R. N. L. R. 28.

the Court was certain that judicial restraint did not mean judicial abdication. "It is the duty of the Judges to determine finally the constitutionality of an impugned enactment. For this they must, after considering all the relevant factors, rely on their own judgement. It does not necessarily follow that because the legislature has passed a law that every provision of the law is reasonably justifiable. The Courts have been appointed sentinels to watch over the fundamental rights secured to the people of Nigeria by the Constitution Order and to guard against any infringement of those rights by the State. If the Courts are to be effective guardians then the Judges must not only act with self-restraint and due respect for the judgement of the Legislature but they must also use their own impartial judgment without undue regard for the claims either of the citizen or the State."¹

Questions concerning the state of emergency came before the Supreme Court of Nigeria on five occasions in 1962. Three of these were stages in Williams v. Majekodunmi,² the decision on an ex-parte application for an interim injunction, the decision on motion for an interlocutory injunction and the decision in the action. The other two were stages in Adegbenro v. Attorney-General of the Federation and Ors,³ the decision on motion for an interlocutory injunction and judgment in the action. Both Plaintiffs contested the general validity of the declaration of emergency, and of the Acts and regulations consequential thereon.

In Williams v. Majekodunmi (No.3),⁴ Chief Rotimi Williams who had been served with a restriction order commenced an action in the Supreme Court seeking declaration and injunction;

1. Cherant v. Cherant, op. cit.

2. (1962) 1. All N. L. R. 324.

3. (1962) W.N.L.R. 185 (1962) 1. All N. L. R. 338.

4. (1962) 1. All N. L. R. 418.

declaration to the effect that the Emergency Powers Act, 1961 or at least Section 3(1) of the Act, the Regulations made under the Act (to the extent that they authorised the Administrator to restrict him) and the restriction Order itself were all ultra vires, unconstitutional and void; also an injunction restraining the Administrator from restricting his movements.

The Plaintiff's argument appears to have been advanced under three main heads, two of which are relevant here. The first was that there had been such an extensive delegation of power by the Governor-General-in-Council under Section 3 of the Emergency Powers Act, 1961 as to be unconstitutional. The Nigerian Constitution carefully balances the powers of the Centre and the Regions; it also seeks, statutorily to preserve individual rights from government encroachment. Seen against the background of the Constitution as a whole, no delegation of powers should be such as could destroy the whole purpose of the Constitution. It was, therefore, contended that to allow Parliament, to enact legislation providing for detention or restriction of movement which power could be delegated was unconstitutional because it would amount to an abdication of Parliament's control over legislation.

This argument was summarily rejected and it was pointed out that Parliament still retained control by reason of Sec. 5 of the Emergency Powers Act, 1961. In the words of Bairaman F. J. who delivered the judgment: "The volume of our laws begin with primary laws passed by the Legislature itself and go on to give the subsidiary legislation made by a person or body authorised by the legislature to supplement its enactments. This convenient method of legislation has been in use over the

years, and there are specific provisions in the Interpretation Act which regulate the making and effect of subsidiary legislation. It is a fair inference that everyone who assisted in the forming of the Constitution, and in particular the legal advisers who attended the Conference (a reference, no doubt to the applicant who was one of the Legal Advisers) were all aware of this method of legislation, and that there was no intention to require that every bit of legislation made after Independence had to be made by the Legislature itself, whether Federal or Regional, or else it would be of no effect. There is, of course, no abdication for the Legislature still has control under S. 5 of the Emergency Powers Act, 1961; to subsidiary legislation per se there can be no objection. If Parliament choose to go a step further and authorises the subordinate Legislator in his turn to authorise another person to do one thing or another, again there can be no objection to that taken by itself. Suppose, for example, that the emergency is that the Federation is at war, it would be desirable to conserve petrol for military operations and undesirable to expend it on frequent meetings of Parliament which would make it wise to have regulations made by the Governor-General-in-Council, and as action should be swift, it would be desirable to enable, say, the Administrators of some remote parts of Nigeria, to do what may be necessary in his area forthwith."¹

No doubt the Supreme Court had expediency in mind in reaching their conclusion, well realising that there may be situations of national emergency when centralised power is a necessity, but nevertheless their reasoning may perhaps have overlooked the fact that the Nigerian Constitutional situation is quite different from the British. There, as in other countries with controlled Constitutions, the Constitution exists to safeguard the people from arbitrary and excessive use of Powers, as well by Parliament as by other authorities.

1. (1962) 1. All N. L. R. at p. 420.

On the question of the restriction order, it was contended that it was not 'reasonably justifiable' for the purpose of dealing with the situation and the Court was urged to reject the view that the Administrator's satisfaction was conclusive. The Attorney-General urged that the question whether measures taken in a period of emergency are reasonably justifiable, could not be determined by abstract principle of right or reason, but by a pragmatic approach to the delicate issue of state security and public welfare, a question on which the Court might prefer to be guided by the evidence of those charged with the day to day maintenance of law and Order.¹

Without necessarily rejecting the evidence of "those charged with the day to day maintenance of law and Order", the Court, and it is suggested rightly, refused to follow the line of judicial abdication of duty suggested and said:

"Those words must be read in the context of the Constitution and more particularly in the context of Chap. III in which they occur. The Chapter confers certain fundamental rights which are regarded as essential and which are to be maintained and preserved; and they are to serve as a norm of legislation under majority rule, which is the form of rule pervading the Constitutions. If they are to be invaded at all it must be only to the extent that it is essential for the sake of some recognised public interest, and may not be farther."²

1. (1962) 1. All N. L. R. at p. 428.

2. Ibid.

The Supreme Court came to the conclusion that "there is nothing in the evidence of the Plaintiff or in that of Mr. Hodge (a Police Officer) who was the only witness called for the Defendant, from which it can be fairly inferred that it was reasonably justifiable to restrict the Plaintiff's freedom of residence and movement".¹ Therefore, the Court declared that the restriction order in so far as it applied to the Applicant was ultra vires and unconstitutional. But it should be added that although the Court had **not let itself** be bound by the shackles of the Liversidge's case subjective test of exercise of executive discretion, the Court was not disposed to grant the injunction which the Appellant asked for against the executive Administrator. "There should be no need for an injunction," the Court said, "the defendant will no doubt take note, and so will the police, of the Court's decision, but if it becomes necessary, the Plaintiff should have the liberty to apply for an injunction."² Subsequent events showed that the reluctance of the Court to order an injunction against the defendant after setting aside the restriction order, placed the Plaintiff at the mercy of the defendant executive. It was reported that fifteen minutes before the Plaintiff heard the result of his suit at his place of restriction, a second restriction order was served on him.³ Though, the Plaintiff was allowed by the Administrator to attend the Supreme Court to argue his case in the substantive action, he was refused permission to be present when judgment was delivered. There is no doubt that this approach of the Court besides being unusual is not in the least favourable to the cause of personal liberty.

1. Ibid.

2. See Williams v. Majekodunmi (no.1)(1962) 1 All.N.L.R. 324

3. See Odumosu op.cit., p. 290.

The Nigerian approach to the problem of judicial review is somewhat between the broad and the strict narrow approach; the broad liberal approach as represented by the practice in the United States Supreme Court and the strict and narrow approach as represented by Britain and some parts of the Commonwealth.¹ At a meeting held in Nigeria in 1960 for the discussion of problems which would face a post-independence Federation of Nigeria, Mr. Justice Brett then of the Federal Supreme Court of Nigeria made the following statement:

"The Courts throughout the British Commonwealth have traditionally regarded questions of policy as outside their scope."²

This statement is significant in shedding some light on the role which the African Judiciary have assumed on adjudicating on "Emergency Power" cases.

More recently the Nigerian judiciary was faced once again with the problem of protecting the individual liberty from undue encroachment by the executive. In the case of Chief A. M. F. Agbaje v. Commissioner of Police,³ the applicant who had been detained under the Armed Forces (Special Powers) Decree 1967⁴ brought an application for a Writ of Habeas Corpus to secure his release, on the ground that his detention was ultra vires the powers of the detaining authority under that decree.

-
1. McWhinney: Judicial Review in English Speaking World Chaps. 5 & 6.
 2. "The role of the judiciary in a Federal Constitution with part reference to Nigeria" in Constitution problems of Federation in Nigeria (1960) p. 21.
 3. Court of Appeal Western State CAW/81/69. See also High Court of Lagos Suit No. M/84/69. Reported in the Council of Legal Education Information Sheet No. 40, 1969 (supplement) Lagos.
 4. Decree No. 24 of 1967.

The Applicant was detained on an Order signed by the Inspector of Police by reason of powers vested in him under Sec. 3 of Decree No. 24. Section 3 of the Decree provides:

"If the Inspector-General of Police, or as the case may be, the Chief of Staff of the Armed Forces is satisfied that any person is or recently has been concerned in acts prejudicial to public order, or in the preparation of instigation of such acts and by reason thereof it is necessary to exercise control over him, he may by order in writing direct that that person be detained in a civil prison or Police Station, and it shall be the duty of the Superintendent or other person in charge of any Police or the Police Officer-in-Charge of any Police Station, as the case may be, if an order made in respect of any person under this section is delivered to him, to keep the person in custody until the order is revoked. (2) An Order made under sub-section (1) above shall be full authority for any Police Officer or member of the Armed Forces to arrest the person to whom the Order related and to remove him to a civil prison or Police Station."

Thus, it is quite clear that the power vested in the Inspector-General is only exerciseable where he is satisfied (a) that any person is or recently has been concerned with acts prejudicial to public order, or (b) in the preparation or instigation of such acts, and (c) that by reason thereof, it is necessary to exercise control over him. The Order under which the applicant was detained read:

"Whereas I, Kam Salem, Inspector-General of Police, am satisfied that the arrest and detention of the person specified in the Schedule hereto as at the date shown against each person are in the interest of the security of the Federation of Nigeria and it is expedient to make this detention order accordingly:-

Now therefore, I Kam Salem, by reason of the powers vested in me under S. 3 of the above-named Decree hereby order that:

(1) The persons¹ so specified shall be detained in Civil Prisons

Therefore the reason for the detention of the applicant on the face of the Order was the interest of the security of the Federation of Nigeria. It was on this ground that the applicant challenged the Order. He claimed that the Inspector-General could order his detention only on the grounds stated in Decree 24. If his detention could not be justified on any of those grounds, then the action of the Inspector-General was ultra vires and his detention order invalid.

In the judgment in the High Court of Western Nigeria², the Court said:

"It should be noted there are wide and arbitrary powers in derogation of the entrenched clauses of the Constitution relating to fundamental rights as contained in Chapter III of the Constitution. It is clear and I have not the slightest doubt in

-
1. Chief Agbaje's name was mentioned in the Schedule.
 2. Suit No. M/22/69. Dr. Justice Aguda presiding.

my mind that in that circumstances, there is cast upon the Inspector-General of Police the onus to establish before any Court in which the exercise by him of powers conferred on him by (above) provision has been challenged, that he has complied strictly with the enactment under which he has acted. Not only that, but it must also be shown that every other person acting under his control or in purported execution of his orders complied strictly with the provision of the Act. (See R. v. Halliday ex-parte Zadig (1917) A. C. 260 at p. 274; R. v. Cannon Row Police Station Inspector ex-parte Brady (1921) 126 L. T. 9 at p. 13). Any material deviation from the provision of the Act must, in my view, render the detention of any citizen of this country null and void, an act for which the writ of habeas corpus is an appropriate remedy". The Judge continued "I bear it in mind that where the liberty of the citizen comes into conflict with the safety and the corporate existence of the state, liberty of the person has to give way to the latter, salus populi suprema lex, especially during times of war or national emergency as we are in at the moment However, it is clear that in the process the Courts have a vital role to play - in fact it is partly for the resolution of such conflicts that the Courts of the land have been established. If the resolution of such a conflict is left in the hands of an arm of the executive as in this case, where the power to put a citizen in custody for no proved offence is left at the discretion of the Inspector-General of Police by an act

of the legislative body, then the role left for the Courts to perform is to make sure that the Inspector-General of Police conformed strictly with the enabling legislation."

In the Court's opinion, the Inspector-General of Police failed to conform strictly to the provisions. The Order did not allege that the applicant had committed any of the offences in the enabling legislation. Therefore, "without such an allegation, the present order exhibited within suit is null and void as they are not in conformity with Decree No. 24 and any arrest and detention carried out under them are illegal."

The Inspector-General of Police appealed against this ruling,¹ and the Western State Court of Appeal, in rejecting the appeal mentioned that the Writ of Habeas Corpus has often been used to test the validity of acts of the Executive and in particular, in time of war or under emergency legislation, like the case before them,² and referred to the judgment of the Supreme Court of India in the case of Singh v. Delhi³ where it was said that,

"This Court has often reiterated before that those who felt called upon to deprive other persons of their personal liberty in the discharge of ~~what~~ they consider to be their duty, must strictly and scrupulously observe the forms and rules of the law."

The Court of Appeal felt constrained to delimit their duty and in doing so adopted the words of Chief Justice Marshall in the famous case of Marbury v. Madison.⁴

1. CAW/81/69.

2. See R. v. Secretary of State for Home Affairs ex-parte O'Brien (1923) A.C. 603.

3. 16 Supreme Court Journal 326.

4. 1803, 1 Cranch 137.

"It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If the two laws conflict with each other, the Courts must decide on the operation of each. So if a law be in opposition to the Constitution, if both the law and the Constitution apply to a particular case, so that the Court must either decide the case conformably to the constitution, disregarding the law; the Court must determine which of these conflicting rules governs the case. This is the very essence of judicial duty."

Thus, the Court set to interpret the provision of law under which the Inspector-General purported to have acted, it came to the conclusion that "The true position, it must be admitted, is that S. 3(1) of that Decree does not call upon the Inspector-General of Police, to be "SATISFIED" on "THE ARREST AND DETENTION" of a person; WHAT he must be "SATISFIED" upon is the EXISTENCE OF CERTAIN DEFINED ACTS. In other words, for the sake of clarity and for avoidance of all doubts, the Inspector-General of Police, must first be "SATISFIED" under Sec. 3(1) of Decree No. 24 of 1967, as to the Existence of certain Defined Acts: thereafter, the question of Detention under that Sub-Section only arises after a Decision to be made by him, as a Consequence of his being further "SATISFIED" that those Acts, Concern the person to be detained." The Court was, therefore, satisfied that the Police order which purported to detain a person in the interest of the security of the State was invalid.

The Counsel for the Appellant had submitted that any Act which threaten the preservation of Public Order inevitably tends to threaten the security of the Country. But the point is not whether the Inspector-General is satisfied as to the need for detention but whether he is satisfied that the

applicant had committed the stated offences or acts. If he is so satisfied then he must say so and also state that those are the grounds of the applicant's detention.

Thus the Court whilst seeming to have accepted that they may have no power to question or inquire into the validity of a Decree, it has maintained that it has the power - indeed it considered it its duty to enquire into the validity and enforcement of orders purported to have been made under the Decree in the same way as it would question the exercise of executive discretion in a civilian emergency administration.¹

However, a most surprising stand point was recently adopted by the Supreme Court when it arrogated to itself the power to question the validity of a Decree promulgated by the Federal Military Government, on the ground that it infringed the provisions of fundamental human rights in the Constitution. The case in point is E. O. LAKANMI & ORS v. THE ATTORNEY-GENERAL (WESTERN STATE AND ORS).² The case is (essentially) an appeal from the Western State Court of Appeal³ which heard and dismissed the appeal of the appellants from the judgment of the High Court of the Western State sitting at Ibadan. The application before the High Court was for an Order of Certiorari to remove into Court an Order dated the 31st day of August, 1967, made by Chief Justice Somolu in his capacity

1. "A legislative, an executive, and a judicial power comprehended the whole of what is meant and understood by Government. It is by balancing each of these powers against the other two, that the efforts in human nature towards tyranny can alone be checked and restrained, and any freedom preserved in the Constitution," in Alan Math: Government by Investigation, at p. 3 quoted by Mr. Justice Ademola in Agbaje v. Commissioner of Police CAW/81/69 (Unreported).
2. S.C. 58/69 (Unreported)
3. The Western State Court of Appeal judgment is reference (1968) C.A.W./35/68 (Unreported).

as the Chairman of the Tribunal of Inquiry into the assets of Public Officers of the Western State, for the purposes of quashing it. The Order was made under the provisions of Section 13(1) of Edict No. 5 of 1967 (of the Western State) which ordered the Plaintiffs or their agents and other persons not to dispose of any of the properties of the Plaintiffs until the Military Governor of the Western State shall otherwise direct. The learned Judge of the High Court dismissed the application,¹ holding that the Order was not ultra vires and that Edict No. 5 of 1967 was validly made, since, according to him, the Federal Military Government Decree No. 51 of 1966² was not in operation in the Western State of Nigeria when the Edict was made. The learned Judge went further to say that the validity or otherwise of the Order made by the Chairman of the Tribunal could not be challenged since Section 21 of Edict No. 5 of 1967 states that:

"No defect whatsoever in anything done by any person with a view to the holding of, or otherwise in relation to, any inquiry under that Decree and this Edict, shall affect the validity of the thing so done or any proceeding, finding, order, decision or other act whatsoever of any person, the tribunal, or the special tribunal and in particular, no action or proceedings in the nature of quo warranto, certiorari, mandamus, prohibition, injunction or declaration or in any form whatsoever against or in respect of any such thing, proceeding, finding, order, decision or other

1. 21/12/67.

2. Public Officers (Investigation of Assets) Decree passed on 28th June, 1966 by the National Military Government, as it was then called, provided for the investigation of assets of Public Officers throughout the country.

act, as the case may be, shall be entertained in any Court of Law."

It may appear clear from the provision in Section 21 of the Edict that the Order of the Tribunal cannot be challenged in any court of Law but this provision can apply only if the whole of the Edict itself was intra vires the legislative authority of the Military Governor of the Western Region. The Military Government which came into office on January 15, 1966, by its Decree No. 1, 1966 retained the Federal structure of the country and maintained the division of legislative authority contained in the Republican Constitution, 1963¹ namely the Exclusive Legislative and Concurrent Legislative Lists. Thus, it provided in Section 3(2) of Decree No. 1, 1966.

"The Military Government of a Region -

- (a) shall not have power to make laws with respect to any matter included in the Exclusive Legislative List; and
- (b) except with the prior consent of the Federal Military Government, shall not make any law with respect to any matter included in the Concurrent Legislative List."

But on 24th May, 1966, Decree No. 34 of 1966 was passed.

Section 1 reads: "Subject to the provisions of this Decree, Nigeria shall on the 24th May, 1966 cease to be a Federation."

By Section 2(1). The Federal Military Government shall be known as the National Military Government.

Section 2(1)(c) makes the Regions a group of Provinces

Section 2(3) deprives a Regional Military Governor of his powers to make laws except by express delegation from the National Military Government.

The National Military Government, as it was then called

on June 28, 1966 passed the Public Officers (Investigation of Assets) Decree,¹ which gives powers as to certain assets of Public Officers to be investigated: Section 5 of this Decree delegated powers to each Military Governor "in relation to their respective group of provinces" to carry out investigations in their provinces, and sub-section (3) states that no Order shall be made by a Military Governor except with the prior consent of the Head of the National Military Government. Thus far it is clear that only the National Military Government could legislate on investigation of assets throughout the country.

On 1st September, 1966, however, the country was once again returned to a Federation by the repeal of Decree No. 34² and the Government once again assumed the name Federal Military Government and position before the Decree No. 34 was promulgated. The problem which this change raises is whether all the Decrees promulgated under the National Military Government could be deemed to have been impliedly abrogated. A positive answer would make nonsense of Constitutional government as this would mean that a change of Government at any time would automatically put all the laws of the old Government into abeyance until they are either specifically adopted or re-enacted by the new Government. The answer to the problem must, therefore, be in the negative.

On 14th April, 1967, the Government of western Nigeria passed the Public Officers and Other Persons (Investigation of Assets) Edict, 1967.³ This Edict covers the same ground as the Decree No. 51 of 1966 of the National Military Government, and in fact, certain sections of the Edict were in direct

1. Decree No. 51 of 1966.

2. By Decree No. 59 of 1966.

3. Edict No. 5 of 1967.

conflict with some provisions of the Decree. It was by virtue of this Edict that the Appellants in this case had the Order made against them by the Chairman of the Tribunal.

The Attorney-General of Western State, whilst admitting that the Edict covered the same field as the Decree and that there were inconsistencies with the Decree, sought to show that at the time the Edict was enacted, the Decree had no force as a Decree in the Western Region. He argued that the cumulative effect of Decree No. 34 and 59 of 1966 was to make Decree No. 51 unrecognisable. What he was, in effect, saying was that the constitutional changes in the country during the period had affected the operation of the Decree. I have already pointed out why this conclusion is unacceptable. The changes made by the various decrees did not at any time deprive the Federal Military Government of its right to legislate as the Supreme Legislative Body. The Decree No. 51 was, therefore, still the only exhaustive and exclusive code as to what was the Law governing the Investigation of Assets of public Officers, throughout the country. It follows then that any other law made by any other Region on the same subject is void.

That was the conclusion arrived at by the Supreme Court when it rejected the decision of the High Court (Western Region) and held that the Edict was ultra vires the Decree of Federal Military Government.

To go back a little bit in time, after the judgment of the High Court, the appellants appealed against the judgment to the Western State Court of Appeal.

While this appeal was pending, the Federal Military Government promulgated three decrees which in effect confirmed the judgment and went further to reassert the point that no decision of any tribunal of inquiry shall be subjected to judicial review. These Decree were, The Investigation of Assets (Public Officers and Other Persons) Decree 1968¹, the Investigation of Assets (Public Officers and Other Persons) Amendment Decree 1968,² and the Forfeiture of Assets (Validation) Decree, 1968³. The first of those Decrees, Decree No. 37 of 1968, repealed both Decree No. 51 of 1966 and Edict No. 5 of 1967 as from the 29th July, 1968.⁴

Section 14(2) of Decree No. 37 provides that the repeal of any enactment or law by this Decree shall not affect any Order, notice or other documents made or thing whatsoever done under the provisions of any enactment or law hereby repealed and every such order, notice shall continue or have effect by virtue of this Decree. Section 14(2) while validating everything that had been done ^{under or} ~~by~~ by the tribunal of inquiry set up under Edict No. 5 also ensured the continued existence of the tribunal of inquiry. Section 12 ousts the jurisdiction of the Court in challenging the validity of anything done under the Decree or any enactment or other law repealed by this Decree. The circumstances under which any such thing had been done shall not be inquired into in any Court of Law, and accordingly, nothing in the provisions of Chapter III of the Constitution (the Provisions dealing with fundamental human rights) shall

-
1. Decree no. 37 of 1968.
 2. Decree No; 43 of 1968.
 3. Decree No. 45 of 1968.
 4. The repealed laws are the contentious ones upon which the Judge of the High Court was called upon to adjudicate and upon which the appeal was pending.

apply in relation to any matter arising out of this Decree or out of any enactment or other law repealed by this Decree.

The effect of section 14 is that although, sub-section (1) repeals Edict No. 5 of 1967, under sub-section (2), the Tribunal of Enquiry about which this complaint arose is to continue its function, and all orders already made by it are validated and are to continue to operate. On the other hand, the effect of Section 12 is that despite the provisions as to Fundamental Human Rights in Chapter III of the Constitution, validity of Orders, notices and directions made should not be inquired into by any Court of Law. But Section 1(b) of Decree No. 43 ^{repealed the section of Decree No. 37} ~~43~~ousting the jurisdiction of the Court.

But a few days later, perhaps the most important of these Decrees, was promulgated. Decree No. 45. Section 1(1) validates all Orders specified in the Schedule.

Section 1(2) refers specifically to Edict No. 5 of 1967 (Western State) and validates the Order by which the properties of the appellants were attached.

Section 1(3) provides a general cover validating all other Orders, notices or documents made or given or anything done by virtue of any enactments within the contemplation of the Decree No. 45.

Section 2(1) brought back the exclusion of the jurisdiction of the Courts in questioning the validity of anything done or powers exercised by virtue of the enactment contemplate by the Decree No. 45.

And Section 2(2) which is perhaps most significant shuts

out completely any proceedings pending in Court either at NISI PRIU or on APPEAL, in any Court whatsoever, with respect to matters contemplated by the Decree. Such proceedings shall abate as from the date of commencement of the Decree.

Applying this to the case, the section would thus have shut out the appeal filed on the 27th day of December, 1967 in the Western State Court of Appeal. Hence, the filing of a notice of preliminary objection by the Western State Government to the effect that the Western State Court of Appeal had no jurisdiction to entertain the appeal. After hearing arguments on the ousting of its jurisdiction, the Court of Appeal upheld the validity of the Decree and declared itself without jurisdiction to hear the appeal. It was against this judgment that an appeal was lodged to the Supreme Court. Essentially, therefore, the appeal was to determine the validity of the Decree No. 45.

The Supreme Court held that the Decree was ultra vires the Constitution because it infringed the judicial power. The Court said,

"If..... the Government, however well-meaning, fell into the error of passing legislation which specifically in effect, passed judgment and inflicted punishment or in other words eroded to the jurisdiction of the Courts, in a manner that the dignity and freedom of the individual, once assured, are taken away, the Courts must intervene.

Decree No. 45 of 1968 was not in form of an alteration of any existing law but it was clearly a legislative sentence and the Decree was spent on the persons named in the Schedule.

We must point out that those who took over the Government of this country in 1966 never for a moment intended to rule but by the Constitution. They did, in fact, recognise the separation of powers and never intended an intrusion on the judiciary. Section 3(1) of the Decree No. 1 of 1966 does not envisage performance of legislative functions as a weapon for exercise of judicial powers, nor was it intended that the Federal Military Government should, in its power to enact Decrees, exceed the requirements or demands of the necessity of the case. In the present case we are satisfied that Decree No. 45 of 1968 did go beyond the necessity of the occasion..... It purported to abate all action and appeals pending before any Court. In short, it stops the pending appeal of the appellants in the Western State Court of Appeal. We have come to the conclusion that this Decree is nothing short of legislative judgment, an exercise of judicial power. It is in our view ultra vires and invalid."

In his argument before the Court, the Attorney-General for the Western State said that what took place in January, 1966 was a revolution and the Federal Military Government is a revolutionary Government which seized power on 15th January, 1966. It accordingly has an unfettered right from the start to rule by force and by means of Decrees and therefore nothing from the Republican Constitution of 1963 can be implied into the new mode of ruling the country; that section 3(1) of Decree No. 1 of 1966 gave the Federal Military Government unlimited power of legislation on any subject either by Decree or by part of the Constitution which

has not been abrogated. In short, his submission was that there was nothing in the Constitution which can make a Decree void. He further submitted that once a document purporting to be a Decree is signed by the Head of the Federal Military Government, it cannot be challenged and no Court has any jurisdiction to adjudicate on its validity.

The Counsel for the appellants, Chief Williams, submitted that the Federal Military Government is not a revolutionary Government but a constitutional interim Government, which came into being by the wishes of the representatives of the people, and whose object is to uphold the Constitution, excepting so far as it had to derogate from it under the doctrine of necessity whereby it was granted power. ~~That thus~~ the Federal Military Government assures the continued existence of the Constitution and in its Decree No. 1 of 1966 impliedly provided for a separation of powers between the legislative, the executive and the judiciary as did the Constitution of Nigeria; that this must be perpetuated unless necessity otherwise arose compelling it under Section 3 of Decree No. 1 of 1966 to make laws by Decree "for the peace, order and good government of Nigeria on any matter whatsoever." This power, it was submitted, must not be read as an unfettered power to legislate to amend the Constitution save in so far as properly justified by the doctrine of necessity. Further, that a Decree prevails over the Constitution only to the extent that the Decree, if otherwise properly made, could amend the Constitution. Finally, that Decree No. 45 of 1968 was a legislative act which impinged upon the sphere of the judiciary and to that extent invalid as an executive interference into the sphere of the judiciary.

When the Army assumed Government,¹ following the coup² of January 1966, the first of the legislative enactments of the Federal Military Government was the Constitution (Suspension and Modification) Decree, 1966,³ which empowered the new Government to make laws for the peace, order and good Government of Nigeria or any part thereof with respect to any matter whatsoever⁴. And in Section 6 of the same Decree, it was provided that no Court of law shall have the power to entertain any question as to the validity of any Decree or Edict.

It is evident from these sections that the Federal Military Government was empowered to legislate for the whole of Nigeria and that its powers are no way derogatory to the powers that ~~that~~ Parliament had under S. 69 of the Republican Constitution, 1963. The power conferred by the Decree No. 1 is quite clear. The Federal Military Government could rule by decree to any extent, it could legislate as it thought fit and could suspend or modify portion of the Constitution. On assumption of power, the federal military Government could have chosen to set aside the Republican Constitution completely and replace it with another, or rule without any Constitution whatsoever.⁵ As the Western State Court of Appeal said, "A new legislative power was created which does not

1. See Government Notice No. 148 of 26th January, 1966.
2. It is the opinion of the present writer that it was a 'coup' in spite of the fictional 'handing over' of Government by the Council of Ministers to the Head of the Armed Forces. Even if the event was merely an army mutiny, it was clear that the civilians could not contain it and the army who could contain it were prepared to do so only if the Civilians abdicated power. The Civilians had no choice. Hence, there was a forcible substitution of a new form of Government.
3. Decree No. 1, 1966.
4. Section 3
5. See T.O.Elias, "The Nigerian Crisis in International Law"- a paper read at the Conference of the Nigerian Society of International Law in March, 1970.

derive its authority from any provision of the pre-existing Constitution."¹

When there is a revolution, however, either in the form of a change of Government by force as in the Obote 'coup' of 1966 in Uganda or in the form of an armed rebellion against the civilian regime as in the three western African countries of Ghana, Nigeria and Sierra-Leone, the Constitution is initially suspended and, therefore, all the fundamental human rights provisions go into abeyance. The new regime authorises itself to legislate by decree on any matter without need or necessity to ensure that such measures are 'reasonably justifiable'. The validity of such decrees can not be challenged in any Court on the ground that they infringe the individual's fundamental right and the possibility of such a challenge is avoided by the terms of the Decree. For example, it is provided in the State Security (Detention of Persons) Decree No. 3 of 1966 of Nigeria that the fundamental human rights chapter of the Constitution (Chapter III) shall be suspended and also the rights of a detainee to apply for a Writ of Habeas Corpus.¹ However, provision is made for an ordinary tribunal to review the case of any detainee.² And there is no doubt that action taken in excess of statutory powers would entitle the aggrieved party to judicial remedy.³

1. Sections 4 - 6. See also Ghana's N. L. C. Protective Custody Decree No. 2, 1966.

2. This is similar to the provision made in the S. 30 of the Constitution in respect of a detainee during a period of emergency.

3. See Chief A. M. F. Agbaje v. Inspector-General of Police and Director of Nigerian Prisons Suit No. M/84/69 of Lagos High Court - discussed in Chapter 5.

The fiction of 'handing over' of the reign of government by the remnant of the defunct civilian regime to the military personnel does not imply that the military took over only on condition that they ruled in accordance with the provisions of the Constitution. If that were so, there would be no basis or justification for the Decree No. 1, 1966. Since the Supreme Court does not doubt the validity of that decree, it is difficult to see how they can come to the conclusion that the power of the Federal Military Government to legislate during the period of the emergency must be circumscribed by the doctrine of necessity.

The learned Counsel for the appellants urged that the object of the Military Government is to uphold the Constitution excepting in so far as necessity arose for it to derogate from the Constitution. Approving of this, the Supreme Court said that the Military Government made it clear that only certain sections of the Constitution would be suspended. But this statement cannot be used to justify any legal limitation or fetter on the Federal Military Government. If a Government has a power to suspend part of the Constitution - and the Supreme Court does not deny this - then it follows that it has the power to suspend the whole of the Constitution. The mere fact that it did not do so immediately, probably for administrative convenience, does not imply that it should be assumed that it would not do so, when it considers that the occasion has arisen to do so.

The Supreme Court says that "It is wrong to expect that Constitution must make provisions for all Emergencies. No Constitution can anticipate all the different forms of

phenomena which may beset a Nation."¹ This is quite acceptable but when an emergency such as cannot be anticipated by the Constitution arises, there is no reason why the ambit of the Constitution should be artificially stretched to accommodate such a situation. Particularly when such a "reading into" the Constitution would result in the chaos and instability which the Constitution seeks to protect. The change of Government such as happened on 15, January, 1966 was such as was not anticipated by our Constitution, but both the remnant of the civilian regime and the Head of the Armed Forces who agreed to take over power of Government tried to create the impression that they were acting in accordance with the Constitution. This could not have been, because as already mentioned the Constitution neither envisages nor provides for a change in this manner, and therefore the Military Government must have derived its legislative authority from source or sources outside the Constitution.

The issue of the validity of the Federal Military Government and of its legislative measures have been before our Courts before. Aside from the Court of Appeal of the Western State's decision in the present case in which that Court upheld the validity of Decree No. 45; there are the cases of Ogunlesi and Ors. v. Attorney-General of the Federation² and the Supreme Court decision in Adamelekan v. The Council of the University of Ibadan.³ In the Ogunlesi case, two Decrees of the Federal Military Government, by which the salaries of certain grades of public corporations' staff were reduced, were challenged as being ultra vires

1. S. C. 58/69 (Unreported).

2. (1970) L.D/28/69 (Unreported).

3. (1967) S.C.378/1966 (Unreported).

the Federal Government which took over from the civilian Government which it overthrew and which could not therefore exercise legislative powers in excess of those laid down in the pre-existing Constitution of 1963, since suspended and modified by Decree No. 1. The High Court of Lagos State held that the two Decrees - the Statutory Corporations (Salaries and Allowances etc) Decree, 1968 and the Statutory Corporations Service Decree 1968, were valid as being intra vires the Federal Military Government whose Decrees can over-ride the Constitution. In Adamolekun's case, the Supreme Court held that the Courts cannot question the vires of the Federal Military Government "in making a Decree or an Edict on the ground that there is no legislative authority to make one. The stand point of the Supreme Court on the present time is therefore, to say the least, most untenable.

The Federal Military Government was, therefore, forced into a position where it had to restate its right to unfettered and unlimited legislative competence by promulgating, a few days after the judgment, a Decree¹ by which the Courts of Law are barred from entertaining any question as to the validity of a Decree and also an Edict which is not inconsistent with a Decree; and that if any such decision had been given, it shall be void and of no effect.

This is the type of inevitability which results from an open confrontation between the judiciary and the legislature. It has been earlier submitted that such should be kept to a

1. Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 28 of 1970.

minimum in any democratic government, because the interest of the citizen which is sought to be protected usually is in more danger when the legislature is made to feel that its authority is being threatened by the judiciary under the guise of protecting the citizen's rights. The unfortunate part of it all is that the judiciary may find itself unsupported by the vast majority of reasoned opinion within the state, as actually was the position in this instance.

An editorial in one of the Nigeria daily newspapers¹ captioned "Laws and Super Laws", gives a pithy summary of the whole conflict. It reads,

"In declaring null and void the Federal Decree No. 45 of 1968 and western State Edict No. 5 of 1967, the Supreme Court took its stand on a banana skin. And not surprisingly, it has been helped to slip. This, unfortunately has the effect of weakening the authority of the Judiciary as a whole. No one, including the Federal Military Government, should rejoice about this. The concept of the rule of law has taken a great deal of bashing in the country. It cannot take much more.

But the Supreme Court has itself to blame. The Federal Military Government argues that by nullifying the forfeiture of stolen public money, the Court did "give the impression that fraud is being encouraged by legal technicalities." We cannot but agree with this. The Supreme Court choose a singularly inappropriate and unpopular measure on which to challenge the authority of Government. It cannot expect sympathy from any quarters on this particular issue. There is no doubt as to who is responsible for ensuring the stability of this Country. The decision of the Supreme Court in declaring Decrees and Edicts null and void was one that threatened to undermine the stability of the country."

1. See New Nigerian, Tuesday, 12 May, 1970.

The problem of judicial interpretation is to hold a just middle way between excess of valour and excess of caution. while judicial timidity may be failure of the judicial oath, a too daring exposition merely aggravates the areas of conflict between the arms of Government, to the ultimate detriment of the individual's rights.

GHANA'S APPROACH TO PREVENTIVE DETENTION

The legality of the Governor-General's order for detention, and from July 1, 1960, when Ghana became a Republic, the President's order for detention, has been repeatedly and fearlessly tested by Counsel in Courts by application for writs of habeas corpus. Thus in the case of Re Okine and 42 Ors.¹ the High Court refused to make an Order. Mr Justice Smith, said in his judgment delivered on January 10, 1959.

"The Preventive Detention Order sets out that the Governor-General is satisfied that it is necessary to make the detention order in question. It is signed, as I have said, by the Ministry of Defence; there is nothing against his signing this Order either in law or in the circumstances of this case. The question of this necessity of making the order at all is not for the Court to consider it also appears well established that where a statute requires only that a Minister shall be 'satisfied' that certain action is necessary the effect is 'virtually to exclude all judicial review on the ground that Ministerial action taken under (such) authority is purely administrative'. Many cases and authorities have been cited in support of this. In Land Realisation C. Ltd. v. P. M. G. (1950) 1. Ch. p. 434 at p.

1. (1960) G. L. R. 84.

445. Lord Romer said: 'It is well settled that where a statutory provision empowers a minister to do something if he is satisfied with regard to a certain state of affairs then a statement by him that he is so satisfied will be accepted by these Courts".¹

On April 21, 1961, the High Court gave a ruling in another detention case: the case of Van der Pujie & 4 Ors.² The submissions by the applicants for the release of the detainees were based on ~~vires~~ grounds, the chief of which are:

- (i) The grounds upon which the applicants were detained alleged the commission of offences punishable under the Criminal Code and since the Preventive Detention Act was a preventive and not a punitive Act the Orders made by the President were punitive and therefore ultra vires.
- (ii) By sec.39 of the Magna Carta the detention violated the bulwark of the liberty of the citizen.
- (iii) Under the Habeas Corpus Act, 1861, Sec. 3, the Court should have inquired into the truthfulness of the facts set out in the grounds.

The Court rejected all these grounds and refused the application. In the course of a lucid judgment Mr. Justice Ollenu, maintained that the essentials for a valid order made under Sec. 2(1) of the Preventive Detention Act were:-

- "(i) That the person against whom the order is made must be a citizen of Ghana, in other words question of nationality and jurisdiction;

1. Ibid. p. 86.

2. (1961) G. L. R. 733.

- (ii) the identity of the person;
- (iii) satisfaction of the President that the order is necessary to prevent, i.e. the good faith of the President". He went on:

"A number of cases local and English were cited to me by both sides and I have given careful consideration to everyone of them. The majority of the English cases are based upon the interpretation of regulation 18B of the English Defence (General) Regulation, 1939, the relevant part of that regulation is as follows:-

"If the Secretary of State has reasonable cause to believe a person to be of hostile origin etc and that by reason thereof it is necessary to exercise control over him, he may make an Order against that person directing that he be detained."

"It is important to observe in contrast with this regulation that Sec.2(1) of the Preventive Detention Act does not prescribe any special premise which should lead the President to the satisfaction upon which alone he could make the Order. The President is the sole Judge of his satisfaction and the grounds for it, once he says ~~he~~ he is satisfied that an order is necessary for one or other of the purposes laid down in the section, his satisfaction cannot be questioned unless his bona fides is challenged. Of-course, if there were a way, apart from his own assertion of determining whether or not he was in fact satisfied before he made the Order, that would have been a proper matter for enquiry into, because if it is shown that he was not in fact satisfied, the order would be invalid. In this regard, I share in the views of Lord Atkin expressed in his minority speech in the case of Liversidge v. Anderson (1941) All E. R. 338 at 349-363, and I would apply it to this case".....¹

1. Ibid. p. 742.

When the Act was again challenged the Supreme Court of Accra, which became the final Court of Appeal in the new Ghana Constitution of 1960 gave judgment in the appeal of Akoto and Ors¹ from the decision of the High Court in which an application for release by writ of habeas corpus had been refused.

Baffoi Osei Akoto, Senior Linguist to the Asathene and 7 others were detained pursuant to the provisions of the Preventive Detention Act, 1958, on the grounds that the Governor-General was satisfied that they had acted in a manner prejudicial to the security of the State. Writs of Habeas Corpus having been refused by the High Court, the detainees appealed against the refusal to the Supreme Court. The appellants advanced, inter alia, the contention that the Preventive Detention Act was invalid because it was in conflict with the provisions of Art. 13(1) of the Constitution.²

The Court held that preventive detention could not be deemed unconstitutional in itself, since the Constitution has expressly authorised legislation providing for it. And by its very nature, preventive detention did not admit of laying down any 'objective standards' of conduct warning the citizen what he must do or avoid doing in order to keep his liberty. Therefore, the argument against the operative section of the Preventive Detention Act, namely, that it left determination of the 'necessity' of making the order of detention to the 'subjective satisfaction' of the executive must fail.³ Furthermore, the provision of Art 13(1), it was

1. (1961) G. L. R. 523.

2. Op. cit. President's declaration of human rights.

3. Note Kania C.J. Gokpalan v. State of Madras A.I.R. 1950 S.C. at p. 43 "It is clear that no such objective standard of conduct can be prescribed, except as laying down conduct tending to achieve or to avoid a particular object."

held, did not create legal obligations enforceable by a Court of Law. The only concession that the Court would make in favour of human freedom against the executive was to agree that where the grounds of detention are made known, though these are not justiciable yet they would be prepared to enquire whether the grounds are sufficiently detailed to enable a detainee to present his case for review to the tribunal provided for by the Act.

The Court emphasised that it would not consider itself authorised to scrutinise whether that 'grounds' are 'sufficient' to justify the detention, such determination being left to the subjective satisfaction of the detaining authority.

Thus in Ghana, the Preventive Detention Act seems to have been equated to the English Defence Regulation 18B. The decisions would seem to represent the low water-mark for human liberty. It need hardly be said that preventive detention is a detestable evil and the very negation of liberty, but the Courts, who are supposed to be the guardians of the citizen's rights, should not have denied themselves the authority to go into the reasonableness of the actual detention especially where the petitioner seeks to establish mala fides on the part of the detaining authority.

As there is no decision yet on the Tanzanian legislation, it would be wrong to prejudge what the attitude of the Court would be or to assume that it would necessarily follow the lines of Ghana. But perhaps the opinion of one of the Judges, in fact the Chief Justice of the High Court would seem to be somewhat indicative. He wrote:

"It should be noted unlike many of the newly independent countries, the Constitution of Tanzania does not set out a declaration of human rights. Where that is done, the Courts would normally have the jurisdiction to procure on legislation and to declare it invalid where it infringed any of the enumerated rights. It may well be that the High Court of Tanzania has no such power. It seems unlikely that the Courts would seek such a role though it could be urged that they could legitimately pronounce against any law which patently cut across any of the arms for which the Constitution has been established.¹

G E N E R A L

In most countries, there is usually a spate of proceedings brought to challenge an Act of the Legislature alleging that the impugned Act is contrary to the fundamental rights and unconstitutional. The Constitutional duty of a Court in such a case is still subject of controversy. The Courts, it has been suggested, should on occasion when it is seized of a case in which infringement of a fundamental right is alleged, firstly to think of the Act not as that passed by individual legislators some of whom he may not share their views, but as the Act of the Legislature - the great continuous body itself, abstracted from all the transitory individuals who may happen to hold its power.² Thus "to set aside the acts of such a

1. "The Court in a one-Party-State" - Tanzania in World Today, Vol 22. For Preventive detention action must be taken on good suspicion. It is a subjective test based on the cumulative effect of different actions, perhaps spread over a considerable period. As observed by Lord Finlay in The King v. Halliday (1917) A.C. 260 at 269 (86 L.J.K.B.1119) a Court is the least appropriate tribunal to investigate the question whether circumstances of suspicion exist warranting the restraint of a person."
2. Mr. Justice Frankfurter dissenting opinion in West Virginia State Board of Education v. Barnette 319 U.S. 699

body , representing in its own field, which is the very highest of all, the ultimate sovereign, should be a solemn, unusual and painful act. Something is wrong when it can ever be other than that."¹

However, "it does not necessarily follow that because the Legislature has passed a law that every provision of that law is reasonably justifiable."² The presumption of the Constitutionality of statutes is based on the premises that the Legislature represents the people and as such would not prima facie wish to exercise its power illegitimately. The basis of this presumption is questionable for there is no warrant for saying that the Legislature, in making laws, always has the interest of the people at heart. At best, it may represent the views of the majority, but what of the minority which might be substantial. And even then the interest of the majority may be and often is in conflict with that of the minority. The application of the presumption to laws alleged to contravene fundamental rights whether guaranteed in the Constitution or by common law is indefensible. It is primarily to prevent minorities being oppressed by the majority that the rights are entrenched in the Constitution, but the operation of this presumption is bound to affect their efficacy. It is gratifying to note that the Nigerian Courts in particular have not completely sacrificed the guaranteed rights to the presumption, particularly in the difficult circumstances of an emergency.

1. Ibid at 670.

2. See Bate J. in Cheranci v. Cheranci op. cit.

"The Courts have been appointed **santinel**s to watch over the fundamental rights secured to the people (of Nigeria) by the Constitution, and to guard against infringement of those rights by the State. If the Courts are to be effective guardians, then the Judges must not only act with self-restraint and due respect for the judgment of the Legislature, but they must also use their own impartiality without undue regard for either the claim of the citizen of the State."¹

During a period of emergency, Governments operate in an atmosphere of haste and urgency and the range of judicial obstructionist interpretation of their activities they would allow vary. Thus, in Nigeria and Uganda, for example, any alleged infringement of rights by emergency measure may be subject of judicial review, and while Ghana has not specifically excluded review, the Tanzania Preventive Detention Act, 1962, specifically excluded judicial review. There must be an acceptable compromise of equipose. The Executive might argue that it is objectionable that the views of the judges as to what the Constitution means should be allowed to thwart the will of the people as expressed through their representatives in the legislature,² as it was done in Nigeria at the time of the Western crisis in 1962.³

After an Ibadan High Court had ruled that Chief Williams, one of those restricted on the Administrator's Order, could not appear as counsel in the case of Akintola v. Governor of Western Region of Nigeria,⁴ the defendants decided to retain Mr. Dingle Foot, a British Q. C. But

1. Bate J. in Cheranci v. Cheranci op. cit. at p 28

2. Wheare, K. C. Federal Government (3rd Edn.) p. 67.

3. See: Odumosu: The Nigerian Constitution (1963) p. 290.

4. (1962) W.N.L.R. 158. A case which came to the Privy Council. See (1963) A. C. 314.

shortly after his arrival in Nigeria with Mr. Colthorpe, a Solicitor also from Britain, an expulsion order was served on them to leave the country within 24 hours. No official reason was given, but the time limit on the order was waived to enable Mr. Foot to make his submissions to the Federal Supreme Court on the constitutional issues referred to it from the Ibadan High Court. Commenting on the expulsion of Mr. Dingle Foot from Nigeria, a Regional Premier stated that it was left to the Administrator of Western Nigeria to use the powers conferred on him by the Emergency Powers Regulations, 1962 to put a stop to the "legal quibbles" designed to flout the legally established decision of the Federal Government on the matter. He said:

"There is emergency in a part of the country and you don't need to fumble in Court in such a situation. If there were an emergency in Britain, would any Nigerian Lawyers be allowed into Britain to challenge the authority of the British Parliament in declaring a state of emergency? I think this democracy of ours is being misinterpreted".¹

As a Commentator has said:

"to some people, being bound by the Constitution is bearable but being bound by what somebody says the Constitution means is not bearable."²

-
1. Quoted in West African Pilot, June 4, 1962 p. 5 as cited by Odumosu op. cit.
 2. Black Jnr. The People and the Constitution. (1960) p. 13

It is however, necessary that the Court should not be regarded as an institution which attempts only to obstruct the Government in the execution of its policy; and therefore as expressed in the classical exposition of Chief Justice Marshall,¹ "There should be no misunderstanding as to the function of the Court. It is sometimes said that the Court assumes a power to overrule or control the action of the people's representatives. This is a misconception. The Constitution is the supreme law of the land ordained and established by the people. When an act of the Congress is appropriately challenged in the Courts as not conforming to the constitutional mandate, the judicial branch of the Government has only one duty - to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter square with the former. All the Court does and can do, is to announce its considered judgement upon the question. The only power it has, if such it may be called, is the power of judgment. This Court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with or in contravention of, the provisions of the Constitution, and having done that, its duty ends". Its duty must end there because as Cooley has stated:-

1. Marbury v. Madison (1803) 1 Cranch. cited by Mr. Justice Owen Roberts in United States v. Butter 297 U.S. 1 at 62.

"The legislative and judicial are co-ordinate departments of the Government; of equal dignity each is alike supreme in the exercise of its proper functions, and cannot directly or indirectly, while acting within the limits of its authority be subjected to the control or supervision of the other, without an unwarrantable assumption by that other power which, by the Constitution, is not conferred upon it. The Constitution apportions the powers of the Government, but it does not make any one of the three departments subordinate to another, when exercising the trust committed to it."¹

But even both these eminent writers must agree that in declaring a law unconstitutional, a Court must necessarily cover the same ground which has already been covered by the legislative department in deciding upon the propriety of enacting the law and they must indirectly over-rule the decision of that 'co-ordinate' department. The task is a delicate one and made more invidious by conditions of emergency when every constitutional issue may bear the tinge of political power, particularly in Africa where the emergency power of detention and restriction has become a punitive rather than a preventive measure.

While the representatives of the people should be in a position to decide when a state of emergency exists and it may be undesirable that such matters should be made subject of evidence in a Court of Law, the task of safeguarding the Con-

1. Constitutional Interpretation (8th Edn) p. 332.

stitution and thereby the citizen's rights should not also be left entirely to the representatives of the people. There must be an arbiter to scrutinise laws and measures taken under them to see whether they are constitutionally justifiable.

INDEPENDENCE OF THE JUDICIARY

Having considered the scope of judicial review of emergency powers, one must agree that any Court saddled with this function is saddled with an immense and onerous responsibility; also that the successful accomplishment of this vital responsibility uncompromisingly calls for such a Court manned by Judges of the highest calibre, strictly impartial independent and courageous. Those responsible for the administration of justice should not be interfered with in carrying out this great task. They should be in a position that would ensure impartiality and therefore they should be insulated from politics; Thus Sir Winston Churchill said:

"The principle of complete independence of the judiciary from the Executive is the foundation of many things,"

and Professor Scharwz is equally certain that judicial independence is largely dependent upon the type of person who are called to serve, thus,

".....The quality of justice depends more upon the quality of the men who administer the law than on the content of the law they administer. Unless those appointed to the Bench are competent and upright and free to judge without fear or favour, a judicial system, however sound its structure may be on paper, is bound to function poorly in practice."

Nonetheless, one must necessarily be concerned with the 'paper' safeguards of judicial independence perhaps to the same extent if not more than the 'morality' of each individual appointee.

Sir Kenneth Roberts - Wray writing about the independence of the judiciary in the Commonwealth countries states:

"To the question how the independence of the judiciary is preserved I suggest a four-fold answer: first, by appropriate machinery for appointment of Judges; secondly, by giving Judges security of office; thirdly, by such general acceptance of, and respect for judicial independence that the members of the Judiciary can rest assured that it is not likely to be challenged and has not continually to be fought for; fourthly, by the terms of service of members of the judiciary".¹ It is now left to consider the efficacy of these factors in ensuring judicial independence.

Constitutions create organs of government with defined functions allocated to each. The underlying belief is that each organ shall be able to fulfil its functions without hindrance and would, in its turn, let others fulfil theirs with the same degree of freedom. The executive controls the use of force, members of the legislature are invested with privileges that they may be better able to discharge their duties. To the same end, the judicial branch of government - under whatever political system - is in need of a special protection from possible interference by the other branches of government as well as from intimidation by ordinary citizens. How far the Constitution should provide for an independent judiciary has not always been a settled point of dispute.

1. See Changing Law in Developing Countries edited by J. N. D. Anderson at p. 63.

A.

A P P O I N T M E N T S

Opinions are sharply divided as to whether the manner by which a judge is appointed could afterwards influence him in the discharge of his duties.¹ The Stuart Kings picked their supporters as Judges but were subsequently disappointed that some of the latter took an independent line in time of political crisis. Up till now judges in Britain, who by all accounts are among the most independent in the world, are appointed by the executive though the convention is fairly settled that the appointing Prime Minister and the Lord Chancellor would ignore political considerations when making an appointment.

When it is pointed out that the Lord Chancellor, the head of the judiciary, is a Cabinet Minister and appointed on the advice of the Prime Minister, that, therefore, the judiciary is not completely free of the executive, then it is not surprisingly that Professor de Smith declared:

"In England judicial independence is maintained in spite of rather than because of the rules governing appointments"²

Professor de Smith went on to argue vigorously against the undiluted export of the Westminster appointment procedure to a new emergent Commonwealth country. There should be a presumption against leaving the power of appointments entirely in the hands of the Executive in such a case, he urged because:

"Even when the government has a full appreciation of the need for maintaining public confidence in the administration of justice and endeavours to exclude all considerations other than professional

1. For a survey of the methods adopted in the leading countries of the world. See Marsh "Working paper on the Rule of Law in a Free Society pp. 281-88.

2. New Commonwealth and its Constitutions at p. 137.

reputation and personal qualities in making its choice, it will have a strong incentive to give undue weight to the political inclinations of potential candidates. For Judges who have the power to determine the constitutionality of legislation can seriously impede the implementation of political policies, they can cause a Government to lose momentum and lose face, they can become (perhaps to their own embarrassment) the darlings of the opposition. If it is too much, in such circumstances, to deny the executive any voice in judicial appointments, there is nevertheless a strong case for limiting the range of temptation."

But since all the newly independent States of Africa within the Commonwealth were recently emancipated from British Rule, it is obvious that the Constitutional provisions must have been influenced to a varying degree by the Westminster procedure. In these States, three broad appointment procedures are discernible.

(a) The Compromise Procedure:

This is so designated because it is an obvious compromise between leaving the appointment of superior Judges absolutely in the hands of the Executive, as obtain in England and the opposite extreme of denying the executive any voice in such judicial appointments. Under this procedure, the Chief Justice generally and the President of the Court of Appeal in appropriate cases, are appointed either on the advice of the Cabinet or Prime Minister or directly by an Executive-President and the rest of the Senior Judges are appointed on the

advice of an independent Judicial Service Commission. This procedure exists (with variations) in Uganda, Malawi and Zambia.

By Section 92(1) of the Uganda Constitution 1966, the Chief Justice of Uganda shall be appointed by the President of Uganda in accordance with the advice of the Cabinet. By Section 92(2) the puisne or other superior Judges shall be appointed by the President, acting in accordance with the advice of the Judicial Service Commission.

Under the Republican Constitution of Malawi 1966, Section 63, the Chief Justice shall be appointed by the President, while other superior Judges shall be appointed by the President only after consultations with the Judicial Service Commission. The Commission comprises the Chief Justice as Chairman, the Chairman of the Public Service Commission, a superior Judge designated in that behalf by the Chief Justice and one other member appointed by the President. It was possibly erroneous not to include the Attorney-General to sit as of right on the Commission. As the principal legal adviser of the Government, he should have been a useful link between the Commission and the Government.¹

B. THE WESTMINSTER TYPE PROCEDURE

Here the Prime Minister (i.e. the Executive) enjoy a monopoly of superior judicial appointments. For example, under the Nigerian Constitution of the first Republic, the Chief Justice of the Federation and other superior Federal Judges were appointed on the advice of the Prime Minister.

1. The Amendment of 1965 in Kenya rectified this omission in its own composition of the Commission.

Under this Head an Executive President¹ has absolute discretion as to the appointment of his superior Judges from the Chief Justice downwards. This type of appointment procedure is very similar to the Westminster type in that in both procedures, a Senior Judicial appointment is an exclusive preserve of the Executive. The difference however is that while under the Westminster type, the Prime Minister or Lord Chancellor has to advise the Monarch who does the appointment, here the Executive President chooses and appoints them himself. He advises himself, as it were, as to what appointment he is to make. This is the procedure in Tanzania² and Ghana³ and though the Chief Justice has to be consulted, it needs no stretch of imagination to visualise the position where such consultation becomes a mere formality on paper.

2.

SECURITY OF TENURE

A Judge who is in fear of a possible summary dismissal, on account of his considered decision which happens to displease the powers that be, is not likely always to decide cases according to law. It is essential, therefore, that neither the executive nor the legislature should be entrusted with disciplinary powers over the judiciary. This policy has been adopted by a number of African Countries though some have rejected it, but in all of them a Judge normally holds office until his retirement at a fixed age.⁴

-
1. A President vested with full executive powers like for example in the United States of America.
 2. See 57(1)(2).
 3. Art. 44(1) Ghana Constitution 1960.
 4. S. 64(3) Malawi Constitution - at 62.

In almost all of the States, for example, Sierra-Leone, Tanzania and Uganda, Kenya, Malawi and Zambia, an ad hoc tribunal appointed by the President or the Prime Minister, as the case may be, and consisting of a Chairman and at least two other members who must themselves be superior Judges or ex-Judges, decides whether a superior Judge should be removed from office. Tanzania has retained this procedure in spite of its de-jure one-party system.¹

Nigeria replaced the foregoing procedure for the less satisfactory British procedure, sub-sec. 2 of Section 124 of the Nigerian Constitution, 1963 now provides that a Judge may be dismissed pursuant to a parliamentary address to that effect, provided that the motion for the address was passed by the vote of no less than two-thirds of all members of the respective Houses of Parliament.

Ghana while retaining the provisions for the Judge's removal by parliamentary address, had gone further by placing the fate of judiciary in the hands of one man, the President. By an amendment to the Constitution in 1964² sequel to the verdict of the Special Criminal Division of the High Court in the treason trial of some Ministers, the President's existing power to dismiss the Chief Justice was extended to all Judges of the Supreme Court and the High Courts. The reason given for this remarkable departure from the practice of other African countries was that Socialist Ghana could not tolerate a judiciary which "is far above the people and becomes an independent power"³

1. S. 58.

2. Act. 224.

3. See "Our charge against the Judges", an article published in the Ghanaian Times of December 20, 1963.

Professor de Smith argues that the procedure that places the question of removability of a superior Judge in the hands of a judicial body rather than leaving it in the hands of the Legislature as the Westminster system does is much preferable. This is because,

"The English system places a premium on the self-restraint of the government and its supporters, a party commanding a majority in both houses might not find a great difficulty in procuring the address necessary for displacing a Judge of whom it strongly disapproved. In a young State a Government enjoying overwhelming legislative support might experience fewer inhibitions in dealing peremptorily with an unhelpful or indiscreet Judge, if only pour encourager les autres. But it is clearly of great importance that a Judge who may be called upon to interpret a justiciable bill of rights or a Federal distribution of powers shall not be intimidated by fears of loss of office."¹

This fear proved justified in Ghana, when Dr. Nkrumah, the then President of Ghana chose to remove the country's Chief Justice, Sir Arku Korsah who had dared to give a judgment of which the former disapproved.²

-
1. New Commonwealth and its Constitution pp. 140 - 1.
 2. See "Treason-Trial and Dismissal of Chief Justice", (1964) 11 Africa Digest 116-117. Art 44 of the Ghanaian Constitution provides: "The Appointment of a Judge as Chief Justice may at any time be revoked by the President by instrument under the Presidential Seal."

3.

PROTECTION FROM INTIMIDATION

Judges must be able to carry out their functions without undue embarrassment. That is why, as a rule, judicial affairs may not be raised or debated in Parliament unless there is a substantive motion to that effect. In addition, superior Judges enjoy immunity from civil and criminal suits in respect of utterances made in the course of their judicial duties. The law relating to contempt affords Judges a further measures of protection. Any action or inaction which amounts to interference with due administration of justice or which tends to have these effects is everywhere treated as contempt of Court.

Apart from these, no judicial office may be scrapped while there is a substantive holder of the office, and the salaries of Judges is charged on the Consolidated Revenue Fund, hence ensuring that it is not subject to Parliamentary discussion every year.

C O M M E N T S

The citizen is now dependent upon the State, the two are intertwined, the one created by the other. Hence Professor H. W. R. Wade can say,

"During the last hundred years the conception of the proper sphere of governmental activity has been completely transformed. Instead of confirming itself to defence, public order, the criminal law, and a few other general matters the modern State also provides elaborate social services and undertakes the regulation of much of the daily business of mankind. The State has seized the initiative, and has put upon itself all kinds of new duties. In order to carry out so many

schemes of social service and control, powerful engines of authority have to be set in motion. To prevent them running amok there must be constant control both political and legal. Ultimately, the political control rests with Parliament, though in reality much power is in the hands of Ministers and officials. The legal control is the task of the Courts of Law."¹

Judges are generally looked upon as conservative members of the community whose decisions ought to be watched carefully lest they stultify the democratic will.² This feeling has resulted in reaction from Judges who are over-cautions to use their power effectively. There are of-course exceptions as shown by the Nigerian decision.³ The principle of judicial restraint is the dignified term in which this reaction is checked. The ex-Patriate Judges in East and Central Africa are more sensitive in this regard though this is not unexpected.

But such is the nature of the jurisdiction conferred on the Judges as the guardians of the Constitution that those who sit in the Supreme Court cannot on occasions avoid a confrontation with the elected government. Constitutional disputes necessarily intrude into the field of politics, for, there stands in the background of every constitutional issue a political question which is capable of developing into a question of power.⁴ It is not suggested that Judges should

1. Administrative Law (1961) p. 1.

2. See de Smith "Federation, human rights and the protection of minorities" p. 29.

3. See Chief A. M. F. Agbaje v. Commissioner for Prisons op. cit. (Unreported).

4. The opinion of a German Court quoted by G. Leibholz, "The Federal Constitutional Court in the constitutional system of the Federal Republic of Germany" in Legal Essays, p. 491 at 497.

exercise this power recklessly, oblivious of the political order in which their decisions are to operate. However, self-restraint judiciously resorted to is distinguishable from an abdication of responsibility.

At the same time, it is important to stress that the notion of "a Government by the noblesse de robe" as an explanation of the nature of judicial power is clearly mistaken. There is only one supreme power in the State, namely, the Legislature, the Executive and the Judiciary acting in a partnership in which each organ undertakes to accord due respect to one another.

Some African States give the impression that this deal is impractical. The executive predominates, instructing a docile legislature on what to do and keeping the judiciary out. The inheritance of colonialism increases the problem. It was only natural in colonial days to think of the Courts as one of the mechanisms through which the metropolitan power exercised its domination. In the struggle for independence deliberate challenges to the law were the order of the day for the important leaders and their more dedicated followers. A prison sentence or at the very least a conviction was the hall mark of devotion to cause. The Courts were certainly not viewed in the light of stalwart champions of individual liberty.

Now the position has changed. A new image must be created. The Courts must be seen as being no longer a mechanism for repression in the interests of the preservation of "Order and good Government". In other words, the concept of judicial review presupposes a political system in which those who wield effective power acquiesce in the maintenance of limits

on the scope of their authority - limits which are set by by a superior law and determined in particular instances by a body of persons over whose decisions they have no control.

In a number of African States political conditions have already reached the stage where recognition of judicial review as a basic concept is out of the question. But even in those States where political diversity is still tolerated there are great difficulties in the way of making judicial review an effective reality.

There is a genuine and widespread feeling that judicial review is anti-democratic. Those who have long been denied their right to express their will on political questions resent any implication that they cannot be trusted to express it wisely through their chosen representatives. No doubt Lawyers are experts on the construction of legal documents, but the Constitution is no ordinary legal document; its spirit can be apprehended by politicians who have need to depute the Judges to act as communal mentors. Everyone is for the rule of law (approximately defined, of-course,) but why must this entail submission to the rule of Lawyers?

Until the principle of judicial review has established itself as a regular feature of constitutional life the Judges will be conscious of the need for the greatest circumspection in handling politically inflammable issues. If a Judge in an African State is European - and in East African many of the Judges are - he will inevitably be aware of the weakness of his personal position. If he is an indigenous

African he may have had a political past that does not endear him to the party in office, he will in any event know that in asserting the superiority of the values embodied in the Constitution over the values that move the holders of political power he will be riding an unruly horse which is capable of transforming itself into a tiger. In which case, the citizen may in the long run be no better safeguarded against the abuse of exercise of discretionary power. In the last resort, the role of judicial review and its efficacy in safeguarding the citizen's rights particularly during a period of emergency, or more realistically, during the exercise of emergency power, will be determined by the prevailing political climate, though it may be influenced by the personal qualities of the individual Judges and the machinery for safeguarding judicial independence.

CHAPTER SIX
CHECKS ON THE EXERCISE OF EMERGENCY POWERS

The fundamental problem of organised society is that of the use and abuse of power: how men may best prevent its abuse and direct its use to good ends. It is axiomatic that power in the sense of the will and capacity of men to ensure the obdience of other men is neither good nor bad in itself but only according to the end which it serves. Perhaps there can be no complete assurance or guarantee against the abuse of power so long as men remain human, nevertheless, it is important and perhaps not impossible to try to tame power so that its exercise shall not be capricious.

In the modern world the problem of power has become particularly urgent. Thus to quote a distinguished American historian, Professor C. H. McIlwain:

"The one great issue that overshadows all others in the distracted world of today is the war between constitutionalism and arbitrary government... The world is trembling in the balance between the ordinary procedure of law and the processes of force which seem so much more quick and effective. Never in recorded history, I believe has the individual been in greater danger from government than now."¹

The learned Professor was speaking in the immediate period of post-war reconstruction following the Second World War but his words are no less applicable to the period following the independence of the new Nations of Africa, who it may be said, are facing an emergency of a different kind, the emergency of proving that they are able to stand on their own feet. It has already been seen, that while the older

1. Constitutionalism Ancient and Modern (1947) p. 1.

nations of the world have used emergency powers to deal with war-time emergency in the main, the newly independent nations of Africa are using equal and sometimes more stringent emergency powers to deal with emergency of subversion or alleged subversion. During such times, the tyrannical use of power is one of the greatest problem. The question, therefore, arises as to what guarantees or safeguards there are to ensure that government does not overstep its bounds.

In a country with written Constitution as are all the countries within this area of study, the Constitution itself provides certain safeguards, and these are going to be considered first.

A. Fundamental Human Rights Provisions

In nearly all the newly independent states of Africa,¹ the Constitution contains the most comprehensive set of provisions on fundamental rights and freedoms. These fundamental rights are found in the entrenched clauses so as to ensure that they are not wantonly done away with by the legislators. In addition machinery is provided for their enforcement, as has already been discussed,² by means of writs of habeas corpus, injunctions and declaratory judgements, which are available to those who allege an infringement of any of these rights.

Their specific entrenchment has a psychological value particularly for the ordinary inhabitant of the new States and perhaps a more psychological deterrent on the government. It is regarded as a charter of liberties no less significant for them than the great Magna Carta must have been to the Barons at Runnymede. It provides a yardstick by which to measure many of the possible misdeeds of the rulers.

1. Except Ghana, Tanzania and Zambia.

2. Chapter 4.

We have seen¹ that during a period of emergency, the Constitution allows derogation from a specified number of these rights in the interest of national security, but such measures as are taken in derogation of them must be 'reasonably justifiable' for the purpose of dealing with the situation created by the emergency. Thus, in so far as there is an encroachment upon the rights not justified by the Constitutional restrictions, the Court will declare the order or statute invalid. Also only limited rights may be affected and this is subject to the provision that whatever measures are taken in derogation of them must be reasonably justifiable. The fact that the phrase 'reasonably justifiable' may not be easy of definition does not completely wipe out the limitation it creates on the exercise of emergency power.²

A Madras High Court referring to the fundamental rights recognised in the Constitution had this to say:

"The fundamental rights recognised in the Constitution no doubt to some extent constitute limitations on the powers of Parliament and the State Legislatures to enact laws and these were intended in the interests and for the benefit of the citizens. To what extent the control should be permitted and whether the legislature in enacting the particular law transgressed its limits without any justification and whether such transgression is within reasonable bounds are matters left open for the Courts to decide."³

1. Chapter 4.

2. See Sec. 29 Nigerian Constitution 1963.

3. In L. T. Swamear v. Commissioner A. I. R. 1952 Mad. 613 at 638.

It is not only laws, however, which must comply with the conditions as laid down by the Constitution in the fundamental human rights provision but also executive acts. If the Executive is conscious that its acts can be questioned, it may not be willing to take rash and impulsive actions.

It is true, as we have already noted, that war or emergency, is no doubt a compulsive circumstance and its existence may justify the exclusion of judicial review of executive or legislative action interfering with citizen's rights, and the writ of habeas corpus may be suspended. But this must be denounced as it was in quite strong terms by Mr. Justice Davies of the United States Supreme Court when he said: "No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its (citizen's rights) provisions can be suspended during any of the great exigencies of government."¹

The exception provided may be so extensively wide that they may nearly deprive some of the rights of their efficacy, nevertheless their value as a safeguard against abuse of power is not completely wiped out. Here we may reiterate the statement of the minorities Commission in Nigeria that even though the provisions are difficult to interpret, "Nevertheless we think that they should be inserted. Their presence defines beliefs widespread among democratic countries and provide a standard to which appeal may be made by those whose rights are infringed. A government determined to abandon democratic courses will find ways of violating them. But they are of great value in preventing a steady deterioration in standards of freedom and the unobtrusive encroachment of a government on individual rights."

1. In Ex-Parte Milligan (1886) 4 Wal 2. 121.

The encroachment may be 'unobtrusive' in peace-times but it is usually more blantant during a period of emergency and it is during this time that the citizen looks more towards these provisions.

In Ghana and Tanzania and Malawi where there are no constitutionally entrenched Bills of Rights, one may well wonder whether this means in effect that the citizen is less safeguarded against abuse of emergency power. This may well be the case as has been shown by the decision of the Ghana Court in Re Akoto.¹ In this case, the Court held that the controversial Art. 13, which proclaims a series of rights and freedom to which the President swears at his installation to uphold, have no more force than the Queen of England's Coronation Oath and imposes no legal obligation or limitation on the power of the President. Perhaps the ultimate guarantee in these countries would depend on whether the Courts would assume jurisdiction to pronounce on legislation which patently cut across any of the aims for which the Constitution was established.²

Declaration and Extension of Emergency:

Most of the countries within this particular area, as has been seen, leave it to the Executive to declare a state of Emergency in the first instance, but within a stated period, the Executive must obtain confirmation of its declaration.³ Thus in Malawi and Zambia, for instance, the President by Proclamation published in the Gazette may declare emergency, but the declaration shall cease to have effect "in the case of

1. /I961/ Ghana Law Rep. 523.
2. The role and attitude of the Judiciary has been discussed in the previous chapter.
3. Kenya: Sec. 39(2) Uganda Art. 145, 1966 Republic Constitution

a declaration made when Parliament is sitting or has been summoned to meet within five days, at the expiration of a period of five days beginning with the date of the publication of the declaration,"¹ and in many other case, "at the expiration of a period of twenty-one days beginning with the date of publication of declaration unless, before the expiration of that period, it is approved by resolution passed by the National Assembly."²

This provision for reference to Parliament constitute a safeguard to the extent that it allows the elected representatives of the people to consider whether the circumstances and the situation justify the action which has been taken by the Executive. Parliament it is assumed will always have the interest of the people who have elected them as a primary consideration if not the most important consideration in allowing a declaration which would necessitate the granting of or taking of extensive discretionary powers by the Executive.

Although it is conceded that the fact that the Executive would have been able to proclaim the emergency before seeking Parliamentary approval gives them the edge yet the threat of disapproval by the Legislature cannot be lightly disregarded.³

1. Constitution of Malawi 1964 S.26(2) Zambia Constitution 1964 S. 29(1).

2. See also Ghana 1960 Constitution.

3. In Nov. 1964 after the Kenya House of Representative had approved a resolution proclaiming a state of emergency, the Senate, the K.A.D.U. Opposition voted against it, thereby preventing its approval by the constitutionally required two-third majority.

Perhaps an even more effective safeguard is that provided in the Constitutions of Nigeria and Sierra Leone, where except in the obvious case of war, the sole responsibility of declaring a state of public emergency is left with the Parliament. Thus Sec. 70(3) of the Nigerian Constitution¹ provides that a period of emergency is any period in which

"(a) The Federation is at war

(b) there is in force a resolution passed by each House of Parliament declaring that a state of public Emergency exists, or

(c) there is in force a resolution passed by each House of Parliament supported by the votes of not less than two-thirds of all members of the House declaring that democratic institutions in Nigeria are threatened by subversion."

One must admit that sub-section 3(b) which requires only a simple majority to pass a resolution in each House is open to abuse and no doubt could easily become an instrument for scoring political advantage. Also one cannot imagine that a Government which has this easy procedure would try to achieve the same ends - proclaiming a state of public emergency - by using the obviously more difficult procedure of sub-section 3(c). It would seem that the greater majority required by sub-section 3(c) can be explained on the basis that activities which could be characterised as subversive of and a threat to a democratic institutions would be less obvious, hence the requirement of that two-thirds majority of the members of each House must be convinced. Although,

1. Constitution of Federal Republic of Nigeria 1963 No. 28 of 1963.

the Provision for a two-thirds majority affords a safer protection, yet its efficacy is much reduced by the alternative provision for a simple majority - which is the common procedure in all other African States - which a Parliament determined to encroach upon the rights of the citizen will obviously prefer. Apart from this, how efficacious is a special majority provision in fact?

Where approval or declaration itself demands the marshalling of certain parliamentary majorities, mostly two-thirds, it is doubtful whether these provisions are really efficacious in fact, in all cases. For it is generally conceded that the underlying assumption in these provisions is that the Government of the day would not have such large majorities at its command and so in order to be able to declare an emergency or have the period of emergency extended,¹ it has got to have the co-operation of the Opposition Party and where this is not forthcoming, it is impossible to have the emergency. In other words the whole special majorities clause depend for their success on the existence of two or multi-party system in which the party for the time being in power is in fact prevented from unilaterally undertaking a declaration or extension without falling foul of the Constitution.

It does follow that in a One-Party State where all types of majorities, however huge, can with ease and alacrity be mustered by the Government for the time being in

-
1. For instance S. 30(3) Uganda Constitution provides in part: "Provided that the National Assembly may, by resolution passed by not less than two-thirds majority of all members of the Assembly extend its approval of the declaration.

power, the whole special majorities clause will in fact appear peculiarly inappropriate and worthless. It seems highly questionable, therefore, whether in Zambia, for instance, a special majorities clause will have any restraining effect whatever, should the Government in power wish to be totalitarian.¹

Even where there is a two or multi-party system, but in fact the Government power is so extensive as to command an overwhelming majority in the Legislature, then the situation is akin to a One-Party State. This was the case in Ghana just after the independence in 1957 and during the whole of the Nkrumah regime.

But the importance of Parliamentary approval whether by simple or special majorities must not be belittled in any way. In order to ensure that the Executive do not keep the citizenry in a permanent state of emergency, there is also provision for Parliamentary review of the situation at a fixed interval in the provision that Parliament must approve any extension over a stated period, which in most cases is not less than three months and not more than twelve months.² One might perhaps suggest that the renewal period should in no case be more than three months.³

Special Provision for Detainee under the Constitution

The power of detention is easily the best known type of emergency power and Constitution framers in recognition of the fact have dealt at length with detention under an emergency.

1. Also Tanzania (which is virtually a One-Party State) and Malawi.
2. In Kenya and Uganda - six months; In Nigeria - 12 months.
3. An Amendment to the Constitution of Kenya removed any renewal period. See 1969 Constitution.

In recognition of the fact that such detention is different from detention under the ordinary law of the land e.g. Criminal Code, it proceeds "upon the principle that a person should be restrained from doing something which, if free and unfettered, it is reasonably probable he would do, it must necessarily proceed in all cases, to some extent, on suspicion or anticipation as distinct from proof"¹; it is provided in general that the detainee shall not only have the right to know why he is detained² but also have his case considered by an Advisory Tribunal. Thus Sec. 31 of Uganda Constitution provides:³

"Where a person is detained by virtue of such a law as is referred to in Sec. 30(5) of this Constitution the following provisions shall apply:

- (a) he shall, as soon as reasonably practicable and in any case not more than five days after the commencement of his detention, be furnished with a statement in writing in a language that he understands specifying in detail the grounds upon which he is detained;
- (b) not more than fourteen days after the commencement of his detention, a notification shall be published in the Gazette stating that he has been detained and giving particulars of the provisions of law under which his detention is authorised;

-
1. per Lord Atkinson in R. v. Halliday ex parte Zadig 1917 A.C. at p. 269.
 2. Cf. Christie v. Leachinsky. [1945] 2 All. E. R. 395. C.A.
 3. There are similar provisions in all the other African States - Sec. 30 Federal Republic of Nigeria Constitution 1963; Sec. 26(2) Zambia Constitution 1964 and Malawi Constitutions 1964 Sec. 24(2) Kenya 1969 Constitution Sec. 83(2).

(c) not more than one month after the commencement of his detention and thereafter during his detention at intervals of not more than six months, his case shall be reviewed by an independent and impartial tribunal established by law and presided over by a person appointed by the Chief Justice;

(d) he shall be afforded reasonable facilities to consult, at his own expense, a legal representative of his own choice who shall be permitted to make representations to the tribunal appointed for the review of the case of the detained person;

(e) at the hearing of his case by the tribunal appointed for the review of his case he shall be permitted to appear in person or, at his own expense, by a legal representative of his own choice.

2. On any review by a tribunal in pursuance of this section of the case of a detained person, the tribunal may make recommendations concerning the necessity or expediency of continuing his detention to the authority by which it was ordered but, unless it is otherwise provided by law, that authority shall not be obliged to act in accordance with any such recommendations

3. In every month in which there is a sitting of Parliament, the Prime Minister or a Minister authorised by him shall make a report to Parliament of the number of persons detained by virtue of such a law as is referred to in Section 30(5) of this Constitution and the number of cases in which the authority that ordered the detention has not acted in accordance with the recommendations of a tribunal appointed in pursuance of this section."

Thus, a detainee is given two opportunities of trying to secure his release, either by judicial review on application to the Court that his fundamental right has been infringed, but if for any reason he is unable to get redress from the Court, his other protection is by way of the **Advisory Committee**.

The Constitution of an **Advisory Board** for the purpose of reporting to the government its opinion on the detention of a person may be said to have been introduced for the very reason that review by the law Courts may be excluded. This no doubt ensures that the detainee is not left unprotected. Further, this elaborate provision may be regarded as an argument against holding that absolute discretion has been conferred on the government. The **Advisory Board** thus stands perhaps midway between the judiciary and the executive. But it is necessary to ensure that it is an "impartial and independent tribunal."

It is usually provided that its Chairman shall be a person appointed by the Chief Justice, but the other members could presumably be appointed by the Executive, as in practice they usually are.

Apart from the criticism of imputting bad faith to the Executive in constituting the **Advisory Board**, the efficacy of this safeguard is much reduced by the fact that its decisions have only recommendatory value and its advice need not be accepted. But one's disappointment should be a little relieved when it is realised that in some of the African States,¹ the Executive is required to inform Parliament at regulated intervals of the number of detainees, the numbers of cases which have been dealt with by the Board and the number

1. Uganda: Sec. 31(3) op. cit.

of cases in which the advice of the Board has been rejected. The detainees case is subject to continuous review at stated intervals¹ whenever he considers that the circumstances have changed sufficiently to make his restriction no longer reasonable.

But it is not only the Constitution which has provided some necessary safeguards. The Constitution being the Supreme Law has demarcated the limits and scope of all the arms of government, that is the Legislature, Executive and the Judiciary. The complexities of modern government, however, necessarily blur the demarcation line of separation of power between the Legislature and the Executive. In an emergency, in particular, it becomes necessary for the Legislature to delegate some of its law-making function to the Executive. One of the problems which must arise from such delegation is the problem of controlling governmental powers without necessarily hindering the Executive in bringing the situation within control. It is beyond possibility and it is perhaps not even desirable that Parliament should control in detail all the activities of the executive during a period of emergency. But having delegated powers to deal with the things or details for which they have neither the time nor competence, it is their concern to ensure, as much as reasonably possible, that these powers would not be abused. Broadly this has been done, outside of constitutional provisions, in two ways: (i) by providing that any rule or regulation made pursuant to the declaration of emergency and the operation of the main emergency legislation, must be laid before Parliament for its approval or disapproval and (ii) by the principle of ministerial responsibility to Parliament,

1. Sec. 83(2) Kenya 1969 Constitution - every three months.

which ensures that Parliament will be informed, by questions and answers, of the state of affairs at any time.

It is now proposed to discuss these ~~two~~ methods of control. In addition, there are other safeguards, as for instance, those provided in the specific legislation conferring emergency power.

LAYING OF SUBORDINATE LEGISLATION:

Within the African countries, there are noticeably two main approaches to Parliamentary control over subordinate legislation made pursuant to a declaration of emergency. These two approaches it might be said represent the negative and positive approaches.

(a) The Negative Approach -

By this procedure, the legislation is allowed to go into operation immediately subject to subsequent affirmation or disaffirmation by a resolution of Parliament. This approach is represented by the Nigerian provision. Sec. 5(2) of the Emergency Powers Act, 1961 provides that "every regulation made under S.3 and every order or rule made in pursuance of such a regulation shall without prejudice to the validity of anything lawfully done thereunder, cease to have effect at the expiration of a period of two months from the date upon which it came into operation, unless, before the expiration of that period, it has been approved by resolution passed by both Houses of Parliament."

It is further provided that any such regulation, order or rule, may without prejudice to the validity of anything lawfully done thereunder, at any time be amended or revoked by resolution passed by both Houses of Parliament. Thus, although the regulations are allowed to go into operation immediately on being made, they cease to have effect either automatically at the expiration of the stated period or by an adverse vote in

in Parliament. This procedure gives the advantage of time to the Administrators without necessarily prejudicing the ultimate authority of Parliament in theory, but in practice its efficacy may be a little doubtful as is shown by the example of Nigeria itself. No sooner on May 29, 1962 had Parliament passed a resolution declaring a state of public emergency than the Executive laid before the Houses thirteen regulations for its approval. There was no doubt that the members could not have had the opportunity of giving adequate consideration to the provisions of these regulations. Perhaps the saving grace, provided Parliament continues sitting during the emergency, is that whatever measures had been taken under a hastily approved regulation, order or rule may at any time be amended or revoked.

(b) The Positive Approach -

By this approach, no regulation is allowed to go into operation unless and until it is approved by resolution of Parliament. This approach is represented by Uganda. Sec. 5 of the Emergency Powers Act, 1963 provides:

"(1) All emergency regulations, if not sooner revoked, shall cease to have effect when the emergency proclamation in pursuance of which they have been made ceases to have effect.

(2) No emergency regulation shall have effect -

(a) during a period when an emergency proclamation is in force by virtue of having been approved by a resolution of the National Assembly under sub-section 2 of Section 30 of this Constitution; or

(b) during a period when an emergency proclamation is in force by virtue of having been extended by a resolution of the National Assembly under sub-section (3) of Section 30 of the Constitution, unless the National Assembly has, by like resolution in such case, affirmed that those regulations shall have effect during that period.

Perhaps in practice this procedure is no more efficacious as a safeguard against abuse of power than the 'negative' approach, because the National Assembly may still find itself approving regulations which it has hardly had time to consider, but at least it attempts to ensure that no action is taken without its prior approval. This may also be the reason why there is no further proviso allowing the National Assembly to amend any regulation after it might have gone into operation. It is suggested that this 'positive' approach is preferable to the 'negative' approach but it is also suggested that Parliament should have the power to amend any regulation at any time subsequent to its operation.

Perhaps the best way of all to ensure that Parliament maintains an effective control is to appoint an ad hoc Select Committee¹ to scrutinise all such regulations before they are laid before Parliament. As the position now stands "no doubt, everything comes back in the end to the question what action members of a party or a group or a combination are resolved to take in proceedings on the floor of the House."²

-
1. On the basis of the war-time instituted British Select Committee on Statutory Instruments.
 2. per Viscount Radcliffe in Akintola v. Adegbenro /I963/ 3 All E. R. at 549.

Ministerial Responsibility to Parliament

As a general sort of limitation, the necessity for the Ministers to answer in Parliament any questions relating to their office constitutes a form of limitation on the abuse of power. This ensures that by means of frequent parliamentary debates and criticism and also in the reports to Parliament on the numbers detained and the numbers of cases in which the Executive or the Minister responsible for the exercise of power of detention, has refused to follow the Advisory's recommendation, a safeguard is provided. This serves as a safeguard of a general sort but its efficacy in any individual case is doubtful since there is no way in which the Minister can be compelled to give the particulars in any case. This difficulty was recognised even in such an advanced parliamentary democracy in Britain during the second World War and led to the suggestion that the discretion be bounded by an appeal to an independent tribunal whose decision would be binding, but most legislators recognise the need for the full responsibility of the executive and the difficulties involved in a judicial review of preventive detention. "One must take into account an abundance of considerations and decide between the liberty of the individual and the security of the State, not only yesterday and today, but the day after tomorrow and in different conditions which may come into existence."¹ It is quite possible of course to suspend the sitting of Parliament during this period.

1. Home Secretary Morrison. Sec. 376 H. C. Debates (5th Sc. 1941) 961, 998.

Safeguard to Preventive Detention under Preventive Detention
Legislation:

A discussion on the control of executive discretion by the legislature would be incomplete without a look at what safeguards if any, are provided against preventive detention under specific Preventive Detention legislation. Within this area of study only Ghana and Tanzania have Preventive Detention Acts, but all the others have the power to make such laws; All their Constitutions provide that Parliament may make laws which it considers necessary for the protection of public order, public security and good Government.

Usually the legislative power over preventive detention is subject to the fundamental rights guaranteed in the Constitution. Therefore, a person who has been detained under a preventive detention law should be able to contend that he has been deprived of his guaranteed liberty, in as much as his deprivation was ~~under~~ under ~~valid law~~ or invalid law, the enacting legislature having no competence to pass such laws. However, the emergence of the new principle invalidating 'any law' abridging the fundamental rights has practically no impact on the legislative power concerning preventive detention where there are no constitutionally entrenched Bill of Rights.

In both Ghana and Tanzania, the President issues the detention Orders.¹ In Ghana, within five days of his detention, the detainee must be furnished with the grounds of his detention, the corresponding period in Tanzania is 15 days.³ Unfortunately, the grounds are often too brief, and perhaps vague. Here is a typical example: "Acting in a manner prejudicial to the security of the State, in that you have encouraged the commission of acts of violence in the Ashanti

1. Ghana Act 240, S. 1.

2. S. 6.

3. S. 6.

or Brongo-Ahafo Regions and have associated with persons who have adopted a policy of violence as a means of achieving political aims in these Regions."¹

The detainee must be afforded an opportunity to make representations to the President, but in neither country is he in a position to confront his accusers on whose sworn testimony the detention was based. His representations must be made in writing.

In Tanzania, but not in Ghana, there is an Advisory Committee whose Chairman and two members are appointed by the President while the other two members are appointed by the Chief Justice. The Committee advises the President whether, in their opinion, an order made should be continued or rescinded or suspended, though the President need not act on the advice tendered.² The Committee is expected to act soon after the President has received the detainee's representations or where no such representations have been made, within a year of the detention order being made and thereafter at intervals not exceeding one year.³ The Committee must be informed by the detaining authority of the grounds on which the order has been made and of such other matters relating to the person detained as may be relevant to his continued detention. A copy of the representations made by the detainee is lodged with the Committee who may interview him if necessary.

-
1. Taken from the affidavit in support of application for habeas corpus by Mr. B. O. Akoto op.cit.
 2. S. 7(6).
 3. S. 7(4).

It will be seen that a detainee under a preventive detention legislation is much less protected than a detainee under the emergency legislation. The former is deprived of the rights to defend himself with the aid of legal Counsel, nor is the detaining authority obliged to do anymore than give the grounds of detention to the Advisory Committee. Moreover, there is no way of ensuring that the provisions are scrupulously followed because it is expressly provided that the detention orders cannot be questioned in any Court of Law.¹ Although no such blantant bar is placed on judicial review in Ghana, the Courts have all but declined jurisdiction. Mention has already been made of the Akoto case in which a futile attempt was made to get the Courts to declare the 1958 Act ultra vires Art. 13(1) of the Constitution. The Courts have further held that the writ of habeas corpus would not lie in respect of any detention order made pursuant to the Preventive Detention Act.

Neither in Ghana nor in Tanzania are provisions made for parliamentary control of detention in lieu of judicial control. Nor is there an obligation to publish the names of those in detention.²

The Judiciary:

We have already discussed the approach of the judiciary towards the use and abuse of emergency power and it has been shown that the judiciary could be made completely powerless by a Government intent on totalitarian measures.³ In

-
1. Act. No. 17. S. 3.
 2. By practice Ghana announces the names of detainees in the Gazette while in Tanzania questions on preventive detention are admissible in Parliament.
 3. See Chapter 5.

exceptional cases the Courts have granted relief when preventive detention orders have been challenged, but there is no doubt that there is very limited opportunity for judicial review. It is sometimes necessary for Courts to review substance and not merely form. This does not mean that the Court may substitute its own 'satisfaction' for that of the detaining authority, but the Court should be able to intervene if the grounds alleged for detention are not inconsistent with the objects of the detention legislation or if mala fides is proved to exist. This has been done in West Pakistan in Mairaj Muhammed Khac v. Government of West Pakistan, and of course the Judicial Committee of the Privy Council has held that the phrasing of a power in subjective terms does not necessarily dispense with the audi alteram partem rule.

As the preventive detention cases show, the challenge to official action based on bad faith is not easy to sustain. Proof of personal animosity or ill-will on the part of some officials or even the Chief Minister of the State Government was not considered enough to enable the Court to quash a detention order on the ground of bad faith unless the detention order was also shown to be unreasonable or perverse; in this respect, the Court could not ignore the requirements of public order in a time of emergency. Thus, in times of grave emergency the Courts may decline to undertake any inquiry into the reasonableness of the grounds on which a responsible Minister, entrusted with the maintenance of national security, choose to exercise powers vested in him, notwithstanding that he is required by statute to have reasonable cause before exercising those powers. The Courts have very little scope for protection of a person preventively detained.

The danger is ever present that the conferment of wide emergency powers on the executive and their liberal interpretation by the Courts abet their abuse. This danger was recognised in Britain for as Lord Dunedin observed; "That is true. But the fault, if fault there be, lies in the fact that the British Constitution has entrusted to the two Houses of Parliament, subject to the assent of the King, an absolute power untrammelled by any written instrument obedience to which may be compelled by a judicial body. The danger of abuse is theoretically present."¹ But as we have seen in previous chapters, the danger is practically present as well, in Africa, and that in spite of the fact that unlike Britain, the African States have "a written instrument" obedience to which should be compelled by a judicial body.

The tenor of interpretation of emergency laws undoubtedly tends to be liberal in an emergency, but in the United States of America for instance, the judiciary did not allow its appreciation of emergency conditions to cloud the constitutional limitations.² There should be no reason why the judiciary in Africa should not attempt such objective position as well.

PUBLIC OPINION

In the words of Lord Wright: "The safeguards of British liberty is in the good sense of the people...."³ There is no doubt that in a Parliamentary democracy, a vigilant public opinion could well be the best and greatest safeguard

1. The King v. Halliday (1917) A.C. 260 at 270.

2. See Ex Parte Milligan 4, Wal 2, 120.

3. Liversidge v. Anderson. (1942) A.C. 206 at p. 261.

of liberty and check against the abuse of governmental power. But this presumes many things, inter alia, a high proportion of educated public and the freedom to express such opinion not only by words but by action through free and fair elections.

The high proportion of illiteracy in Africa makes it impossible to reach large sections of the people through the press, which it is accepted is the mouth organ of the public; it is, therefore, impossible to assess not only how far the press represent the public but also how far the press help to formulate public opinion. Other media of information are not in a better position because of vast distances which they cannot reach due to lack of good access roads and modern amenities, like electricity.

Although there are provisions for elections but whether these are sufficiently free and fair to justify them being regarded as representative of the peoples feelings must remain a matter for conjecture. Allegations of rigging abound, and allegations of pre-election intimidation of opposition members are now becoming a commonplace. But one major factor which would appear to give a lie to the freedom of exercising one's choice is the trend towards one-party States in Africa. They have been achieved through various ways in the different countries, by mergers, dissolutions, absorption or suppression of opposition parties. Speaking on West Africa in particular, Professor Arthur Lewis finds "it significant that no party now in power went to the polls in a free election seeking a mandate to create a single-party system.... Single-Party power was seized, not granted by the voters."¹ This is true of East and Central Africa as well. He examines the different reasons given to justify the system, and finds that the single-party

1. Politics in West Africa (1965) pp. 34-5.

"fails in all its claims. It cannot represent all the people; or maintain free discussion; or give stable government; or, above all reconcile the differences between various regional groups it is partly the product of the hysteria of the moment of independence, when some men found it possible to seize the State and suppress their opponents."¹ Though these conclusions are based on reasoned examinations of the facts, the progressive adoption of the single-party by one African country after another attests to its popularity with the African leaders. Their popularity perhaps show more clearly that they are considered effective in preventing criticism and opposition. Opposition or criticism within a single-party system presupposes that opposition must be confined within the limits set by the leadership and the ideology and programme of the one party.

C O N C L U S I O N

The need to equip the State with necessary powers in order to resist subversion or its threat is obvious. Indeed it may be suicidal to deny the State adequate powers in its hour of peril. But it is equally necessary to ensure that the extra-ordinary powers vested in the State are not open to abuse, otherwise it would be highly detrimental to the interest of democracy and the Rule of Law. It is, therefore, necessary to provide for adequate checks against the possible abuse of wide emergency powers. As the proceeding chapters show there is hardly any limit to the powers of the Government in an emergency. There is no denying the fact that in a democratic state the effective safeguard against abuse of powers whether in peace or in an emergency, is ultimately to be found in the existence of enlightened, vigilant and vocal public opinion.²

A constitutional declaration cannot by itself make a country

1. Lewis: Politics in West Africa (1965) p. 63.

2. See Gajendragadkar J. In Makhan Singh v. State of Punjab
A. I. R. 1964 S. C. 381.

democratic and free, nor does universal sufferage overnight make it so. Granting adult franchise is undoubtedly a great step in the direction. In countries where illiteracy and poverty exist on an extensive scale it takes at least a few decades for democracy to become an accomplished fact. In Africa, the political safeguard in the shape of enlightened, vigilant and vocal public opinion is not as effective today as it should be.

While meeting grave emergencies in England both Parliament and Executive have generally shown great self-restraint in so far as interference with civil liberties of the subject was concerned. That is due to the effectiveness of the political safeguards viz "the good sense of the people and in the system of representative and responsible government which has been evolved,"¹ and a vigilant press. In the United States, besides the political safeguards, there are effective judicial safeguards. There, the judiciary plays a vital role in checking abuse of emergency powers by the State. In the absence of similar safeguards the chances of abuse of emergency powers are very present in the newly-independent African States of the Commonwealth. To quote the opinion of an eminent writer: "He was speaking on India but it would appear that his observation is equally well applicable to Africa".

"Power has a tendency to be all-embracing and to remove from its path all impediments and obstacles. Therefore it is the course of wisdom to circumscribe power as much as possible. We still lack the great democratic

1. per Lord Wright in Liversidge v. Anderson (1942) A. C. 206 at 261.

corrective of an opposition. Our Parliamentary institutions, although based on those of England, lack the one salutary check which England provides to dictatorship. We have here the rule of one party with very little possibility of that party being replaced by any other. There is no more dangerous dictatorship than the dictatorship which wears the garb of democratic institutions. A dictatorship which has been raised to power by a popular vote has nothing to fear and need suffer no qualms of conscience."¹

It has been shown that in some cases, in the African States within this area of study, emergency powers have already been used for purposes other than the absolute necessity of state security. There is need to guard jealously what little safeguards are provided and strengthen them. The insistence upon the safeguards already discussed ought to be used to protect the citizen sufficiently against abuse of emergency powers.

1. M. C. Chagla, *Individual and the State* (1958) p. 11.

CHAPTER SEVEN

MILITARY TAKE-OVERS

Between the middle of June 1965 and the middle of March 1968, military coups d'etat caused the downfall of nine African governments,¹ including three of the newly-independent African States within the Commonwealth, that is, the militantly "African Socialist" regime of Dr. Kwame Nkrumah, the Federal Government of Nigeria, ostensibly committed to Western-style parliamentary democracy, as well as Sierra-Leone. And the beginning of 1971 saw yet another one in Uganda.² These coups were not, unfortunately, isolated events, but only the latest of an increasing number of political upheavals that have scarred the young lives of at least twenty-seven of the thirty-seven independent African - governed States in general.

Coups, counter-coups, assassination attempts and communal violence seem to have become almost commonplace in the newly-independent African States. Given the facts, the temptation to explain the prevailing instability in terms of some single sweeping set of generalisations is difficult to resist. Many Africans as well as the socialist friends of these newly-independent States, prefer the thesis that it is all caused by massive- neo-colonialist interference.³ As an explanation it is as demeaning and condescending as that advanced by those who argue the basic political incompetence of Africans. It is clear that the facts support neither explanation. Those interim assessments that can be

1. Congo Kinshasa Nov. 25, 1965; Dahomey Dec.22,1965; Central African Republic Jan.1,1966; Upper Volta Jan.3,1966; NIGERIA Jan.15,1966; Burundi Nov.28,1966; Togo Jan.13,1967; SIERRA LEONE March 22,1967; GHANA Feb.24, 1966.
2. JANUARY 25, 1971.
3. This argument has the dual utility of preserving the myth of the political virginity of Africans and of permitting those who are fearful of the consequence of independence to evade its responsibilities.

made of recent military intervention in politics in these newly-independent Commonwealth African States reveal that explanations, if there are any, must be sought within the particular situation of each troubled African State.

It is worth remembering that African politics remain, by and large, territorially limited; in all but a few of the States the primary political imperatives of government still include the consolidation of power, the extension of central authority to the whole territory and the creation of stable, reliable civic loyalties. With this in mind, examination of post-independence instability in Commonwealth — Africa suggests a discussion of the role and intervention of African military in politics.

Overt political intervention by Africa's military at its own initiative is a recent phenomenon. Before 1964, almost all examples of military involvement in political crises could be explained as responses to initiatives taken by politicians. Military men were the instrument of politicians in the mutinies in the three East African Countries of Tanganyika, Uganda and Kenya. Hence a well-known writer stated:- "While the armed forces of Africa remain small in proportion to the total populations and to the areas of the countries, they may well intervene in politics in conjunction with other elements, perhaps from the police and civil service; but they are unlikely to be able to consolidate their positions and establish military regimes. They generally lack the necessary professional cohesion and have not sufficient technical 'know-how' to be regarded as uniquely capable of running a country. This is almost certainly the answer to those who pose the question of the possibility of military coups in Nigeria or more particularly Ghana when ennui or resentment

against the current regime become dominant emotions".¹ Within a short period, however, the military became the principal initiator of changes in regimes, marching against all politicians in Ghana and Nigeria presumably because "ennui or resentment against the current regime had become dominant emotions."

The armies of contemporary Africa are the direct descendants of forces created by the Colonial Administration. Pre-colonial raiding forces and palace armies were disbanded or placed under severe restrictions. The prime duty of the colonial army was internal pacification, not international involvement. Border defence involved some troops, but since most frontiers in Africa separated non-antagonistic colonial powers, the main objective was prevention of smuggling.

In the colonial period, the armies of Africa were kept small, primarily because they were intended as adjuncts of the administration, used to suppress domestic violence. They supplemented police forces in restoring calm, or by show of force, a reputation of rapacity, and occasionally outright brutality. Soldiers were often recruited from "martial" tribes, then stationed far from their place of origin, often among traditional enemies. Ill-trained and ill-disciplined in many instances, colonial armies "were tools of the white conquerors."²

At independence, most African military establishments were small, ill-equipped and short of indigenous officers. Expatriate officers tended to dominate the top command echelons. However,

1. W. Gutteridge: The Military Institutions and Power in the New States. (1964 Pall Mall Press) P. 143.

2. Van der Berghe. "The Role of the Army in Contemporary Africa" in Africa Report. March 1965, p. 14.

in both Nigeria and Ghana, a significant number of African officers could be found. Initially, the politicians entertained some suspicions of their military establishments, probably because they feared that their officers, having served under the colonial flag, might still harbour divided loyalties. The African officers responded by positive affirmations of their devotion to the new regimes, and the politicians in turn began to see their armies as valuable adjuncts to the exercise of civilian power. Gradually the various officers corps built up. The possession of a properly equipped national army became a matter of national prestige, a proof of the authenticity of independence, and sometimes a welcome aid for governments seeking to maintain internal peace. Within a couple of years the new armies, small as they were, began to acquire a sense of their own importance. They were usually well taken care of, told of their significance, paraded in front of visiting dignitaries and their officers deferred to and consulted; officers training schools were opened in various countries and young intelligent men could see in the military stable careers as officers with promotions and rewards coming as rapidly, if not more rapidly, than in civilian government service.

In tracing military intervention in Africa, one can distinguish three types. The first type, relative passivity and abstention from political interference, was usually confined to the immediate post independence period. The armies remained under substantial expatriate influence, which precluded (or certainly made more difficult) any meddling in politics. This was the period of "non-political army",¹

1. For a caustic view of the "non-political army" in Ghana, see Geoffrey Bing, Reap the whirlwind: An account of Kwame Nkrumah's Ghana from 1956-1966, (London Macgibbon & Kee 1968) pp.416-38.

in which a commander such as General Alexander could proclaim, "in the armed forces we were practically free from this taint (of politics)".¹ The second type of involvement saw resentment against European officers and African political leaders explode in mutinies. These outbursts were not intended - at least not directly - to unseat the government in control. They were aimed rather at forcing the government to adopt certain policies, notably higher pay, pension privileges, or immediate Africanisation of the officer corps. Coup d'etat, the third type, brought full-scale military involvement in politics. The occupants of presidential palaces were removed, possibly executed; into their offices moved the initiators of the intervention or their nominees, intent on "restoring" the country to "normal" patterns.

By 1963 most armies in the newly-independent African countries had become important political tools, a stable and reliable prop for the regime. They had discipline, cohesion and purpose. These characteristics increasingly stood out in relief as their political systems turned sour around them. Not surprisingly many African military leaders became more and more estranged from politicians and the temptation to intervene to 'save' the country was probably becoming too strong to resist. Evidence suggests that the key officers in Nigeria and Ghana had become convinced by late 1965 that only they could rescue their countries from collapse, chaos or disaster, or all three.² They were saving the national patrimony, they said, and when they succeeded in seizing and holding power, they were believed, applauded and hailed as saviours. And in each of the countries, the politicians (described in such terms as greedy, corrupt etc) were the particular targets.

-
1. H. T. Alexander, *Africa Tightrope: My two years as Nkrumah's Chief of Staff* (New York, Praeger, 1966) p. 20.
 2. See Afrifa, A., *The Ghana Coup* (London 1966) and Gutteridge W. F. *The Military in African Politics* (Methuen 1965).

It was no surprise that in these countries, following military takeover, political parties were banned altogether or temporarily dissolved and that the new governments were typically composed of a combination of military men and "technicians". It must be added that rationalising their interventions apparently did not completely free the new military rulers from all lingering doubts about the propriety of their actions. They promised that at some later date when the policy had been purified, civilian rule would be permitted to return. It is true that in Nigeria the promise have become increasingly vague as the magnitude of the job of ruling became clear to the military rulers.

The Military seizures of control that rocked the sub-Saharan area, particularly that within this area of study, from mid-1965 on cannot be attributed to a single factor. The complexities of events belies simple, unicausal analysis.

It is tempting to speculate that a successful military coup in one African country may have encouraged officers in others to try the same thing. There is, however, no direct evidence that any one coup was connected with any other, and it has yet to be demonstrated that there has developed in Africa what some analysts call 'a culture of violence' in which resort to violence or coup d'etat becomes a natural and accepted way of bringing about political change. However, the major political upheavals caused by military intervention in some of the newly-independent African countries have this in common, that they took place in countries whose political or economic systems were on the verge of collapse or at least appeared to be, which to the military men involved amounted to the same thing. The specific connection between economic and political crises and military intervention is admittedly

hard to prove. The evidence does, however, permit the conclusion that there may have been some connection in the sense that incipient governmental collapse contributed to or triggered military intervention. The distinction between real and imagined is made because what is important was the perception of the situation by the military actors. One may say that neither of the three West African countries, nor Uganda, was really on the verge of political or economic chaos, but it is a fact that in the West African countries, either political or economic conditions had deteriorated to the point where the soon-to-be displaced rulers themselves publicly voiced alarm about them. It is also a fact that in all these countries, there was a declining prestige of the major political party, as exemplified by (a) increased reliance upon force to achieve compliance, (b) a stress upon unanimity in the face of centrifugal forces and (c) consequent denial of effective political choice. To illustrate these generalisations each country must be examined individually.

The Case of Ghana.

Dr. Kwame Nkrumah had pioneered the route to freedom from colonial rule in Africa. In so doing he had proclaimed an idealism concerning African unity which appealed to the youth of Ghana as well as in other states of the continent. Ghana was, moreover, at independence more economically sound and more homogenous and therefore more politically stable than other African states. In other words Ghana was nearer to being one nation than most of her contemporaries and to some extent ripe for exploitation and leadership by a man who sought to glorify Ghanaian and thereby African achievement.

As a country also it possessed an exceptionally well developed elite, including an efficient civil service and sound security forces in which a professional code of behaviour was noted. These facts to a certain extent inhibited the emergence of open protest and dissent against an authoritarian regime. Pronouncements by the leaders of the 1966 coup almost invariably stress their original reluctance to be involved in unconstitutional action. The seeds of the Ghana coup inevitably germinated slowly.

In 1957 newly independent Ghana inherited from the British a small army of three battalions of infantry and ancillary troops which was still commanded by British Officers. Africanisation of the officer corps was proceeding at a reasonable speed and was already being reinforced by the selection of more senior ranks for staff and specialist training. In the next three years plans were made to accelerate officer production and to expand the army over a period of years. At this stage, the foreign support for the Ghana armed forces came primarily from Britain, though Indians and Israelis were introduced to help the development of the Air Force.

In a small new state the Army is necessarily less isolated from political developments than in advanced Western countries, particularly where there is one all pervasive political party and not much formalised opposition. Nevertheless there were very few military personnel in 1960 who were "up to their necks in party politics" in spite of the personal promotion advantages which might have been assumed to accrue to individuals who chose this line of action.

The early months of 1960 were characterised by Nkrumah's

taking a more constructive interest in the armed services. Late in 1959 he had initiated the training of an air force and had also spent much time discussing officer provision. The result was the establishment in March 1960 of the Ghana Military Academy at Teshie, east of Accra on the road to Tema; here a cadet course was organised on Sandhurst lines with a British Commandant, Director of Academic Studies, and supporting staff of whom a small minority were initially Ghanaian. The objective was accelerated Africanisation on the best terms possible.

In July 1960 the establishment of the Republic of Ghana with Nkrumah as President was followed closely by the Congo crisis. These two events can in retrospect be seen to have marked the beginning of the real deterioration in Nkrumah's relations with the Army and its attitude towards him. Though he cultivated the officer corps with banquets and other signs of anxiety to maintain their loyalty, the combination of a greater power of interference by the President in military affairs with the strain of actual operations in the international limelight created foci of inflammation which enlarged over the years as the regime became more fearful and oppressive.

The revision of the Ghana Constitution in 1960 was important in this connection in that it entrenched the position of the President in a number of ways. Effectively, only the size and formal initiative of raising armed forces rested with Parliament thereafter. The Head of State acquired powers to dismiss or suspend Military Personnel and to exercise a veto on an officer's authority. He could require the defence forces to engage in an operation for any of a number of specific purposes or for "any other expedient purpose."¹

1. Republican Constitution of Ghana 1960. Art. 54.

The immediate involvement of the Ghana Army in the Congo in July 1960 was in part made practicable by the President's newly acquired authority. Broadly speaking, the experience of the Army in the Congo developed the Ghanaian soldiers pride and confidence in themselves. But they also began to be distrustful of political leadership, first of all that of others - particularly in view of the chaotic disorder into which the Congolese people and the "Force Publique" had got themselves and then their own. It was not only the special initiative of Nkrumah in providing Ghanaian troops for the Congo in anticipation of United Nations intervention which tended to place those troops in an ambiguous position, it was also the special relationship of Ghana's President with Patrice Lumumba. The relationship of Ghana's contingent to the United Nations command was continually embarrassed by the activities of the two Ghanaian political representatives in Leopoldville, Andrew Djin and N. A. Welbeck. This began a process which was finally to erase confidence in the political leadership from the minds of many officers.

In political terms then the Congo operation was a scaring and formative experience for the Ghana contingent. Colonel Afrifa in his book The Ghana coup, 24th February, 1966,¹ expressed this view:

"The fault was that of our politicians at home who had placed us under the command of the United Nations, and at the same time taken active and sinister sides in the whole Congo Affair . . . Kwame Nkrumah had placed us in a terrible dilemma through an unbridled political adventure. He appointed and directed a stream of stupid ambassadors like A.Y.K. Djin and N. A. Welbeck . . . Could it be that we had been sent to the Congo to foster the ambition of Kwame Nkrumah?"

1. London 1966, page 66.

Thereafter the fear that the President would commit them to some potentially disgraceful and disastrous adventure was a matter of intense concern to some Ghanaian Officers. A succession of events at home also tended to reinforce the developing distrust of politicians. The general strike starting in Western Ghana in 1961 involved the use of Army units and the virtual ringing of Accra by a force. The coincidence of the ending of the Sekondi - Takoradi strike with the dismissal of several British Officers reflected both Nkrumah's largely unwarranted doubts about the willingness of such officers to carry out his orders in a serious internal political crisis.

From 1962 onward the upward spiral of Nkrumah's fears for his own security began to affect the Army. The attempted assassination by bomb at Kulungugu in the North of Ghana on 1st August 1962 followed by an explosion near Flagstaff House, Accra, early in September evidently caused the President to rethink the problem of his protection. He sought help from Communist countries in constructing a personal guard unit and tried to establish tighter personal control over the police force. The suspicion that army personnel were implicated in Kulungugu bomb affair caused him to turn to non-Africans for protection. At this stage he created the President's Own Guard Regiment and stocks of Russian weapons were accumulated.

The regular army's reaction to these manoeuvres, which were accompanied by a run-down of equipment and general neglect of their interests, was naturally one of resentment. At an earlier stage, there had been some attempt to install political agents or "Commisars" in army units which inevitably involved a disruption of the Army hierarchy. By 1964 it was clear that there was a real danger that the only institution capable of

resisting Nkrumah by force would before long lose its effectiveness. However, there is no evidence of any serious propositions of resisting the determination of the Army's national position. Colonel Afrifa claims "that the possibility crossed his mind in 1962 and was revived more practically only to be blocked by the suspicions of the counter intelligence organisation in 1964."¹

The development already described and other indications such as the tentative steps to militarise the workers Brigade seemed to the Army a threat to its own professional existence and the Air Force and the Navy were equally nervous of what might follow. The threat to the integrity of the various elements in the Ghanaian elite combined with the President's rapidly declining foreign prestige and the economic chaos in the country arising from prestige spending seemed to bring the situation to a head and to precipitate a coup. Until further evidence is published there seem small reason to doubt the account given by Colonel Afrifa in his book.² They seem to have been reinforced in their intentions by the overt relationships of some of the officer corps with the politicians. Afrifa refers to the fear that Nkrumah would order the Army to take independent action against Rhodesia and confirms his belief in a "non military solution". He says:³

"Among our troops Nkrumah became unpopular because of this. They realised that he was sending them to war without proper equipment and without adequate preparation. The moment they started complaining I knew that the days of the Convention Peoples' Party were numbered."

1. The Ghana Coup, 24th February 1966, (London, 1966) p. 85.

2. Afrifa op. cit. p. 96.

3. Ibid. pp. 104-5.

Whether the rank and file were as disconcerted as Afrifa implies, is doubtful but it is clear and obviously tenable that the coup was not only the last resort against an unpopular government but also the only means, in the circumstances, of overthrowing President Nkrumah. Colonel Afrifa's words are categorical:

"Where there was no constitutional means of offering a political opposition to the one-party government the Armed Forces were automatically made to become¹ the official opposition of the Government." This and the ripeness

of popular discontent - there were hundreds of people in detention for unstated and undisclosed reasons - carried the select group of officers trained in the allegedly a political British tradition through the resistance of their own consciences, but only their own ingenuity and discretion enabled them to achieve surprise in an informer-ridden society. Nkrumah's departure for Peking and Hanoi was chosen as the signal because it was probably rightly felt that his absence would make the coup easier and less bloody. On February 23, the military toppled Nkrumah's regime and the following day Colonel Kotoka² announced on the air that "the myth surrounding Nkrumah has been broken."³

Within a brief time the whole superstructure of the Nkrumah regime collapsed in such a way as to demonstrate the unique degree to which even the Convention Peoples' Party had been dependent upon Nkrumah's own inflated personality.

1. Ibid p. 31.

2. Col. Kotoka was killed in a subsequent attempted counter coup.

3. Afrifa, op. cit. p. 35.

Almost without a break the administration of the country was picked up by the National Liberation Council (NLC).

The leaders of the Ghana coup were no exception to the usual rule that military leaders intervening in politics rarely have preconceived policies which they intend to apply. Essentially such groups begin by administering rather than governing: they are caretakers whose initial intention is often to end a trend of which they do not approve and to provide the framework within which government can be enabled to set off on a fresh course. They are not likely to have plans for wide-spread change and the effect of their seizure of power may be virtually to wipe the political and constitutional stat^{es} clean.

"The immediate post-revolutionary state of the successor government is the political equivalent of that of the newborn babe. In it the functions of government are reduced to the minimum compatible with the survival of the social organism and the extension of political control throughout it from the initial stage of mere existence."¹

The first phase of the post-coup administration was predictably a condemnation of the corruption and maladministration of its predecessor - those facts were its raison d'etre, but even in his first major speech, a radio broadcast four days after the coup, General Ankrah² stressed the intention of returning to genuinely democratic practices. He also said that the new government would resist all actions aimed at the undermining of the integrity of other African

-
1. Peter A. R. Calvert, "Revolution" the Politics of Violence" in Political Studies, vol. 15 No. 1, February, 1967, p. 11;
 2. He was named the Chairman of the National Liberation Council.

states and would cultivate a genuine non-alignment in foreign policy.

The first weeks and months of the new administration involved the dismantling of the complex ramifications of the old regime. While Nkrumah's opponents held in prison under the Preventive Detention Act were released en masse, political parties were banned and politicians and administrators with known Convention Peoples Party affiliations were arrested and placed in protective custody¹ pending a screening procedure which was, on the whole, operated with a reasonable sense of urgency.

Just over a year after the original coup, an amateur counter-coup came near to success and in the process caused the death of General Kotoka. This counter-coup has generally been described as not essentially political and as arising from the discontent of Junior Officers. In so far as its motives are at all clear, it might be classified as primarily an inter-generational conflict of the kind which is prone to emerge in rapidly expanded armies when promotion prospects eventually decline. The murder of General Kotoka had grave implications for the Council's effectiveness which it subsequently managed to weather. In many respects the attempted counter-coup did not alter the re-development of the country by the new regime.

The extent to which Ghana became a military regime is disputable. Martial law was never declared at any stage although it is true that the Army was at an early stage given the arbitrary power of arresting persons thought to be engaged in subversive activities, and the Constitution

1. Protective Custody Decree 1966. NLC Decree No. 2.

was suspended together with its already inadequate protection of fundamental human rights. In this respect it might thereby have attracted some of the dislike directed against the previous regime, but it appears that at no stage did the use of arbitrary emergency powers approach the height it did during the Nkrumah regime.

The Ghana coup reflected clearly the power of the security forces especially in a small and compact country to take over the administration and to provide the opportunity for a reappraisal of the political situation. Stability in Ghana has involved a reversion to known values. Nkrumah's creation of rival institutions, especially to the Army, was probably more important than the kind of idealism expressed by Colonel Afrifa in spurring the Army into action against his regime. The superior organisation of the Army enabled them to assume power. They made progress in many cases towards cleaning up the mess left by politicians, but to do so the officers had to rule by decree like an old-time colonial government or the post-independence civilian government assuming emergency powers. But the question is whether in future the armed forces will be able to resist intervening again when a new political party in office pursue policies which they are disposed to criticise.

SIERRA LEONE AND THREE COUPS.

In some respects the sequence of events in Sierra-Leone has adhered to the African 'pattern'. The political leadership of a post-colonial state had been undermined by corruption and the quest for personal power, and was replaced by a military junta. If the 'pattern' were to be maintained, the stability of the country might be further endangered by conflict within the army itself, arising from

the personal ambitions and tribal affiliations of individual officers. Until 1967, however, there had been reason for hoping that Sierra Leone might have avoided this process of post-colonial decay. That Sierra Leone should have suffered the same fate as that of many other new African States confirms the fact the future depends more than anything on the personal characters and ambitions of the men in power. The instability of Sierra Leone dates not from the attainment of independence in 1961 but from the death of its first Prime Minister, Sir Milton Margai in 1964.

The Sierra Leone Peoples' Party (SLPP) had won the post-independence elections in 1962 under Sir Milton's leadership, but had suffered considerable loss of popularity since his death. His successor, his brother Sir Albert Margai, never enjoyed his popularity with the electorate. Faced with accusations of corruption and with a sharp decline in the country's economy, Sir Albert had good cause to fear the outcome of the 1967 elections. Support for the Opposition All Peoples' Congress (APC) was growing rapidly, especially among the northern tribes and in Freetown, while opposition to him within his own party was likewise growing. Sir Albert, an adviser of Nkrumah, had been advocating the introduction of a one-party State to secure his own position. Nkrumah's downfall cast shadow over this plan, and the pressure of public opinion forced him to abandon the idea. He made a subsequent attempt to amend the constitution in his own favour by proposing a new republican form of government, under which his own powers would have been greatly increased. Constitutionally, however, this proposal could only be finally ratified by the House of Representatives after a general election, so that he

was unable to avoid going to the polls. Election were scheduled for March, and he resorted to a variety of measures to ensure that he would retain power.

With the fate of the political leaders of Ghana and Nigeria fresh in his mind, Sir Albert was understandably nervous of the role his army might play during the elections. The Commander, Brigadier Lansana, was a close friend and a member of the same Mende Tribe, but the effectiveness of his command was in doubt, and he had been defied in 1966 by some of his junior officers. Opposition was expected from the northern officers in particular, led by Colonel Bangura, and it therefore came as no surprise when Sir Albert announced the discovery of a 'plot' against him, early in February 1967. Colonel Bangura was arrested together with six of his fellow officers, all of them northerners or Guineans. The practical effect of their removal was to leave the army firmly in the control of Brigadier Lansana. As an extra precaution, Sir Albert adopted the course of threatening the country with a foreign army; he hastily concluded an anti-subversion pact with President Sekou Toure of Guinea, and units of the Guinean army took up positions along the border.

Sir Albert now felt secure enough to deal with the threat from the electorate. Before the elections were held, six of the SLPP candidates were declared elected "unopposed, including Sir Albert himself, his younger brother Sam and two of his Ministers. This disqualification of their opponents was subsequently upheld by the Mende-dominated Electoral Commission. Ensuing demonstration by APC supporters were put down with the help of the army.

The sixty remaining seats for ordinary members of the House were contested on March 17, 1967, and the APC was able to secure a majority over the SLPP. All the main mass information media under the control of Sir Albert announced the results in such a way as to make it appear that the SLPP had won.¹ The Governor-General Light-Foot-Boston attempted to resolve the situation by inviting the APC and the SLPP to form a coalition, but Siaka Stevens the Leader of the APC rejected this offer. On March 21, the Governor-General ignoring threats from Brigadier Lansana, swore Siaka Stevens as the new Prime Minister.

Constitutional Justification.

The Constitution Law concerning the Governor-General's action is clear. Paragraphs 58(2) and 64(1) of the Constitution empower him to appoint as Prime Minister, "in accordance with his own deliberate judgment", that member of Parliament "who appears to him likely to command the support of the majority of members of the house." In this context, the Dove-Edwin Commission² recalled that the appointment of Sir Milton Margai as Prime Minister in 1962 had not been questioned, though the election of that year had not given any party an over-all majority in the House, and concluded that the Governor-General's interpretation of his powers on 21 March had been entirely justified.³ The Attorney-General, Bertham Macaulay, had advised the Governor-General that in his own view 'that the duty of the Governor-General is not to determine what person has the support of the majority of the members of the House. His duty is to determine what person

1. See Humphrey Risher, 'Elections and coups in Sierra Leone, 1967' in Journal of Modern African Studies (1969) Vol.7 No. 4 pages 624 - 626.
2. Set up to inquire into allegations of illegal practices in connection with the election.
3. Report of the Dove-Edwin Commission pp. 16 & 19. Wade and Cryer refuted as 'baseless' Lansana's accusations that the Governor-General acted unconstitutionally. See Annual Survey of Commonwealth Law 1967 (London 1968) p. 78.

is likely to command the support of the majority of the members of the House."¹

This emphasises that the Governor-General has the right and even the duty to exercise his discretion. He did so, and to disagree with his judgment is not at all to prove that he should not have done so. Even if the Governor's critics had a legitimate grievance, that would be far from demonstrating that military revolution was the proper way to express it.

Declaration of Martial Law.

Brigadier Lansana acted with military promptness, martial law was declared before Siaka Stevens could leave State House. The Governor-General was accused of having acted unconstitutionally in appointing Stevens as Prime Minister and Lansana, adopting the title of "Chief Custodian of State Security", announced that the two men were under house arrest "for their own safety." In his broadcast to the nation he said, "..... No party has as yet got a sufficient number to form an overall majority of the members of Parliament. Only this morning at about 10.30, the Governor-General assured me that he would not proceed with the appointment of a Prime Minister until he had had consultations on Wednesday March, 22. That is tomorrow. This (the swearing in of Stevens as Prime Minister) is an attempt to ignore the constitution and seize power by force. This, as I assured the Governor-General this morning, will lead to chaos and civil war. As a custodian of state security, I have decided to protect the constitution and maintain law and order. Therefore, from now on, we are operating under martial law. I repeat, we are operating under martial law."

1. Letter of 4th February, 1967 from Attorney-General to Governor-General quoted by Fisher: op. cit. p. 627.

Lansana then summoned the newly elected members of the House of Representatives to a meeting in Freetown in order to resolve the crisis. But the meeting never took place. Popular feeling was outraged in Freetown when they heard of the Lansana "coup", and barricades were thrown up by a huge crowd and a number of people were killed and injured in sporadic incidents. It was apparent that Sir Albert would not be able to retain power against the strong tide of public opinion and that Brigadier Lansana was also unpopular both with the populace and the army for him to be able to exercise effective control on Sir Albert's behalf.

The Counter-Coup

Accordingly on 23rd March, two days after he had taken power, Brigadier Lansana was arrested by three of his junior officers and taken into "protective custody" along with Siaka Stevens and Sir Albert Margai.

The new junta said, ".....we, the Senior Officers, have since noticed that the attitude of the Brigadier was not to bring about the creation of a national government but to impose Sir Albert Margai as Prime Minister." So they immediately suspended the constitution, deposed the Governor-General and dissolved all forms of representative government both national and local. Political parties were banned and the press subsequently forbidden to indulge in any political comment or 'defamation' of the military regime. The junta assumed absolute power itself, adopting the title of National Reformation Council (NRC)¹ and claimed to have

-
1. Lt.Col.Genda was appointed as the chairman of the NRC. Genda had been sent into diplomatic exile in New York in 1966. However, before he had time to return to Sierra-Leone, he was replaced by Col. J. Smith it was alleged that he was prevented from entering the country.

a variety of patriotic motives.

At first a long tradition of freedom appeared to have ended, for Col. Juxtom-Smith speaking to the nation explained the effect of martial law thus ".....Let me say this now, there is martial law in Sierra Leone. Perhaps it wasn't explained to the populace what martial law means. It means that military law is supreme to civil law, and that anybody who does any act or conduct or neglect (f) which is which is prejudicial to the interest of the state, that person will be immediately court-martialled, the maximum sentence for which is death. And I'll have no scruples in whatsoever to confirm the sentence, because as Commander-in-Chief and Head of State it comes to me for confirmation you will be immediately apprehended, you will be tried by Court-martial and you will be shot by a firing squad. That is what martial law means....." ¹

Within a few days, however, the pressure of public opinion was already reasserting itself in the capital and the army - although supported by the police - began to feel insecure in its new governing role. The small size of the army, combined with the doubtful loyalties of its rank and file, made it impossible for the NRC to impose any violent measures. The release of Brigadier Lansana from detention a mere fortnight after his "act of treason" was not well received in Freetown, however, and the regime soon found it necessary to release Siaka Stevens and seven other army officers who had been detained by Sir Albert in February.

However, the NRC on March 26, tightened arms regulations and former ministers and other deputies were ordered to return government cars and vacate government housing. This may have been the first sign of the NRC's realisation of past

1. See Fisher, op. cit. p. 635.

political corruption. NRC Proclamation of the same date suspended parts of the Constitution, authorised the NRC to suspend any others at any time and retroactively to March 23, and empowered the NRC to detain at will in the interest of public order and safety.¹

After a series of demonstrations in April in Freetown, a civilian National Advisory Council was appointed to work out a new Constitution and the eventual return to civilian government. The NRC had in fact lost much of its effective power during its first few weeks and government policy was increasingly determined and controlled by the civil service. The de facto Government began to look less like a stratocracy and more like a bureaucracy, in which the military NRC ruled by decree on the advice of government officials.

The Third Coup.

Amid spreading rumours that the NRC Chairman Lt. Col. Juxton Smith was planning to declare Sierra-Leone a Republic with himself as President, the NCO's² and enlisted men staged their own coup during the night of April 18, 1968. By the next day, nearly all officers of the army and police had been rounded up and locked in Pademba Road Prison in Freetown. The NCO's set up a National Interim Council that ~~was~~ pledged to restore civilian rule and on April 26, after consultations between the All People Congress (APC) and the Sierra Leone Peoples' Party (SLPP) leaders, Siaka Stevens was once again sworn in as Prime Minister, this time as Head of a Coalition Government of APC, SLPP and independents. The new Civilian Government has kept on the books the NRC decrees allowing for preventive detention and forbidding meetings of political parties.

1. S. 6.

2. NON-Commissioned Officers.

It could be said that the original Sierra Leone coup leaders and the NRC which they formed, disregarded in a unique fashion the recipe for a successful coup. They seized power for predominantly selfish reasons and in so doing thwarted the popular political will. In power they failed to live up to the image of the upright patriotic soldier and thus provoked an 'other rank' rising of the kind which has rarely been successful. By interfering with political evolution, however briefly and accidentally, they showed clearly that while the Army is the convenient agent for the suspension of activities in a deteriorating situation, it is inherently unsuited for the task of political reorientation, and when it fails even for a time to 'clean-up' the administration, it may become a force tending to encourage instability rather than the reverse.

The Nigerian Tragedy.

At the beginning of 1966 there were about ten thousand Nigerians professionally under arms, of whom about eight thousand were in the Army. The Army was organised in normal circumstances into two brigades with headquarters at Apapa in Lagos and at Kaduna (in the then Northern Region) respectively. There were five infantry battalions each of between seven and eight hundred men, three of which were stationed at Abeokuta (Western State), Enugu (in the former Eastern Region) and Ikeja (near the Lagos International Airport) and two more located at Kaduna. Largely because of the attitude of the former Northern Region Government the greatest concentration of troops was at Kaduna, where the battalion barracks were conveniently close to the Government buildings and Ministerial residences. The Kaduna District

also included the Military Academy, the Air Force Training Centre and the Ordnance Factory. Like most African Armies, the Nigerian at the time of the coup consisted essentially of Second World War Infantry Battalions plus certain ancillaries.

The Nigerian Army had served with relative distinction in the United Nations Force in the Congo and in 1964 replaced the Royal Marine Commando in helping the Tanzanian Government through the difficult period after the Army Mutiny there. As far as training and procedure were concerned the Nigerian force conformed to the Commonwealth pattern which had proved useful in terms of standardisation in the Congo operation.

As far as personnel was concerned, the Army was widely regarded as the least tribalistic of Nigerian institutions even by those who in 1966 appeared by their actions to contradict the validity of this view. Nevertheless it is true that at the time of the initial coup the three most senior Officers promoted to their ranks on a combination of merit and length of service represented respectively the three main regions and that both the battalion commander at Enugu and the Brigadier in Kaduna were Yorubas, while the District Commander in the South was a Kanuri from the North. It may well be that this kind of common sense dispersion was in itself a precaution against tribalism not far beneath the surface.¹

-
1. During the earlier emergency in the former Western Region capital, Ibadan, the expatriate G. O. C. had himself had virtually to take command to obviate tribal difficulties in spite of his own delicate position.

The coup of 15 January 1966 did not, of course, derive solely, if at all, from tensions within the Army itself. Discontent with the distribution of power was more widely based than a single institution but perhaps also found its expression in the Army. There was also resentment against corruption in high place both at the Federal and Regional levels and in the former Western Region acute dissatisfaction with the results of the alleged rigged election of October 1965 and the manner of their achievement. Hostility to individual politicians varied in intensity; the Federal Prime Minister, the late Sir Abubakar Tafawa Balewa, seemed simply to lack the power to pursue his own policies and to control the excesses of his colleagues; to the Federal Finance Minister; the late Chief Festus Okotie-Eboh, was popularly and probably rightly attributed massive misappropriation of the nation's financial resources; and the late Sardauna of Sokoto and late Chief S. L. Akintola, then Premier of Western Region, were regarded as having secured to themselves political power and influence beyond that which they could rightly claim to be based on popular support.¹ Suspicion that the Sardauna intended by some means to tighten the Northern grip on the Federal power machine was also an important factor in the timing of the coup. Though it will be difficult in view of the deaths of so many of the participants to establish finally the whole truth, there is no doubt that, by a number of officers who were responsible for the events of January 15, 1966, their action was seen as preempting decisive intervention by the opposing faction.

1. All the afore-mentioned personalities were killed in the coup.

The Regional Election of 1965 in the former Western Region had been followed by such a degree of violent disorder that the possibility of using the Army on a large scale had clearly been in the minds of some political leaders. A massive action against opposition elements in the former Western Region was not acceptable to Ibo Elements at least in the Army and the fear of such a decision seems to have been the key factor in bringing plans for a coup to a degree of ripeness. Though there are good and obvious grounds for believing that the plotters felt it necessary in any case to wait for the end of the Commonwealth Prime Ministers' Conference in Lagos before taking action, the spark which caused the explosion appears to have been a meeting in Kaduna on Friday, 14 January, 1966, at which it was alleged plans were made for military action aimed at settling the state of disorder in the former Western Region.

On Sunday, 16 January, 1966, those members of the Nigerian Cabinet who were still available in Lagos met under the Chairmanship of Albaji Zanna Dipcharima and agreed to hand over Government temporarily to the Army and the Police.¹ At 11.50 p. m. on that night, the acting President² announced in a broadcast that the Council of Ministers had unanimously agreed to hand over the Government of the Federation to the Armed Forces with Major-General Aguiyi-Ironsi as Supreme Commander of the Military Government, who promptly decreed the creation of Regional Military Governments responsible to the Federal Military Government.³

-
1. For a detailed account of the course of events of the coup see West Africa. Jan. 22, 1966.
 2. G. N. 147 Federal Gazette 1966. President Azikiwe was absent on leave in Britain for health reasons.
 3. G.N. 148. Decree No. 1 of 1966 Constitution (Suspension and Modification) Decree.

When the Military came to power they met with a great welcome from those echelons who wished for modernisation and nation-building and who were impatient with the corruption of the old order. Almost all sections initially welcomed the change. In spite of a careful beginning, however, relationship between the various groups in the Army and the Government deteriorated almost from the start of Ironsi's administration. In spite or perhaps because of the carefully impartial selection of Regional Governors to suit local needs, the suspicions and mistrusts generated earlier and brought to a head by the event of January 15 inevitably festered.

With the overthrow of civilian rule, the peculiar violence of tribal confrontations arose from the Military Government's ineptitude in dealing with a situation of cleavage and its initial lack of skill in the task of conflict resolution. The Military failed to realise that they had a political function to fulfil in terms of representation of diverse interests and mobilisation of opinion. Their natural bitterness with the corruption of the political class previously in power blinded them to the fact that political echelon had some real skills in conflict resolution and that there were many politicians who were not discredited.

The hostility of the Military to the political echelon springs from a variety of causes. Soldiers believe that politicians are too talkative, the Military ethos is like that contained in the Hausa proverb "mai fada ba zai yi susutu ba" (the warrior is not talkative). They believe that politicians do not speak the truth and that soldiers do, that politicians concentrated on things that divide in order to muster support whereas the Military create unity. The

Military are accustomed to controlling their lower ranks by a strict command in which obedience and loyalty are the prime values. The idea of leaders taking advice from the led or altering their course according to the feeling expressed by the lower ranks is repugnant to their idea of command.

After the take-over, even though, there were no longer any formal institution of representation,¹ the function of representing divergent interests had to be aggregated and uneducated people mobilised not just by orders but by a sense of participation; and sense of legality had to be created and conflicts had to be reconciled. For these tasks the means which have proved adequate for running a regiment are insufficient within the body politic. The small proportion of Military in the administration meant a heavy reliance for guidance upon the Senior Civil Servants.

The July Counter-Coup.

Instead of using political intermediaries to bridge the gap between the leaders and the led, the Military relied solely on the Civil Service. When they struck at the interest of these intermediaries in the North by decree No. 34 on the unification of the Civil Service, the May riots occurred and many people, particularly Ibo residents were killed. Between May and July the Army itself became increasingly politicised and two rival groups arose based on regional origin.

Throughout June and early July the efforts of the members of the Military Government showed a continued concern for the

1. See Public Order Decree 1966 No. 33 and Constitution (Suspension and Modification) (No. 1) Decree, 1966.

basic problems with which the administration was faced. Both Federal and Regional Military Governments then made considerable effort to make clear their intentions, but the flight from the North on the part of the Ibos had already begun and from this time onwards there were frequent rumours of scares within Army Units about one tribal group taking violent action against another.

The counter-coup of July, for this it was, was clearly on tribal lines, the objects of attack in each station being the Ibo Officers and men. For almost a day, Nigeria had no Government,¹ but at the end of it, Lieutenant - Colonel Yakubu Gowon (as he then was) was proposed as Head of the Government.² Gowon thus took over Ironsi's rule faced with the fact that the basis for Nigerian unity had been dissolved, which he bravely interpreted as meaning simply that the proposed unitary structure was totally impracticable and that Nigeria would have to be reconstructed.

Events from the end of July through to October 1966 transformed the situation. Certainly with the reconstruction of the Nigerian Forces and subsequent break-down in communication with what was then the Eastern Region and eventually

1. Accounts of the events of the day are still not clear. It is generally accepted that the units in the West generally and in Kaduna were in a state of rebellion, Major - General Ironsi who was on a visit to the Western Region capital, Ibadan, was killed together with the Military Governor of that Region. It was reported that the most Senior Surviving Officer, Brigadier Ogundipe, after an abortive attempt to regain control of the rebel forces at Ikeja, refused to assume command of the Army and Government.
2. See Keesing's op.cit 1966 p. 21613-21614 and (1966) Annual Survey of Commonwealth Law; (1967) Public Law p.70.

the preparation for war, Nigeria really ceases to be a valid example at least for comparative purposes of Military intervention in politics.

However, like most African coups, the Nigerian event was partly about corruption and malpractices and a general disgust with wealthy politicians. But more accurately it was about the distribution of power complicated by the fact that the various factions were distinguishable on a tribal basis. "A situation which cannot be changed by constitutional means invites the use of violent measures in the same way as a life president can only be removed by force or assassination."¹

Gowon Emergency:

Gowon, tiring of the vain effort to use conciliation to halt the drift to disintegration,² took personal power from the Military Council by the declaration of a State of Emergency in May 1967 and cut the Gordian knot by creating twelve States in a kind of rough surgery.³ This action raises constitutional problems, but in order to appreciate the problems, it is necessary to go back in time to the original coup d'etat on January 15, 1966. The Federation's Executive and Legislative powers were vested in the sole person of the Head of the Federal Military Government (FMG) and Supreme Commander of the Armed Forces i.e. Major-General Aguiyi Ironsi, and the Federal Executive

1. Afrifa op. cit.

2. For detailed account of the events at conciliation See Keesing's op cit. W. F. Gutteridge. The military in African politics (Menthuen 1968) p. 80 - 90.

3. See State (Creation and Transitional Provisions) Decree 1967.

Council under him. The Federal Executive Council was made up of the Head of the Federal Military Government and Supreme Commander as President, the Military Governors of the four Regions, the Heads and Chiefs of Staff of the three Armed Services and the Inspector-General of Police and his Deputy, with the Attorney-General of the Federation as adviser.¹ Its main function was to exercise powers vested in Ministers under the 1963 Federal Constitution. Thus the Federal Executive Council exercised general direction and control over all Federal Government departments; specific executive powers vested in the Head of the Military Government by law could be delegated to the Federal Executive Council, but not his entire executive authority, which extended to the execution and maintenance of the Constitution of the Federation. Although, for the sake of convenience, the word 'Federal' was retained after the establishment of Military rule, in actual fact the exclusive division of executive and legislative powers, which the term connotes, had gone. In practice, the country was under the control of a Military junta known as the Supreme Military Council, which exercised the powers legally vested in the Federal Military Government. Within the Supreme Military Council (SMC) the status and powers of the Head of the Federal Military Government, the President, were much more those of a primus inter pares. While he was empowered to delegate to the Supreme Military Council or the Federal Executive Council any functions under the executive powers vested by law in the Head of the Federal Military Government, he could not delegate his entire executive authority.

1. The Military Administrator of the Federal Territory was later made a member of the Council.

This situation obtained until 24 May, 1966, when Major-General Ironsi issued his Decree 34 abolishing the Federation, unifying the public services and declaring Nigeria a Unitary System of Government.¹ On September 1, 1966, Lt. Col. Gowon (as he then was) who had replaced Ironsi following the July counter-coup, repealed Decree 34, restored the Federal System and re-vested the Federation's Executive and Legislative power in the Head of the Federal Military Government, that is, himself and the Federal Executive Council under him. He reverted to the practice of allowing the Supreme Military Council to exercise the powers legally vested in the Federal Military Government.

Early in 1967, a Decree² was issued which vested authority formerly held by Lt. Col. Gowon (as he then was) as Head of the Federal Military Government and Supreme Commander, in the Supreme Military Council. However, in the exercise of the most important of its powers on the exclusive and concurrent list of the 1963 Constitution, the Council was to be obliged to have the 'concurrence' of the Head of the Federal Military Government and all the Regional Military Governors.

Under the 1963 Constitution, the Federal Government has the power to declare a State of Emergency and to legislate

-
1. This action as already mentioned set off a chain of events that ended in his overthrow and assassination in July 1966.
 2. Constitution (Suspension and Modification) Decree No. 8 of 1967. This Decree was ostensibly to formalise what was agreed between the Military Governors at a meeting in Aburi (Ghana). The Aburi meeting was called by General Ankrah of (GHANA) to reconcile the differences which had arisen between Lt. Col. Ojukwu on the one hand and the rest of the Military Government on the other.

during such an emergency on all matters, including those normally outside central legislative competence¹ and in cases also where Regional Executive authority might be so exercised as to "impede or prejudice the exercise of the Executive Authority of the Federation."²

Although, Decree No. 8 made all important matters affecting the country as a whole subject to the veto of any Regional Military Governor, and simultaneously made each Regional Governor supreme in his own Region - for example - exercising all executive and legislative functions - there was one important restriction. The Decree revived sections 70 and 71 and 86 of 1963³ Constitution and empowered the Supreme Military Council to declare a state of Emergency and to legislate as it should think necessary after such a declaration or to take appropriate measures against any Region that "shall exercise its executive authority so as to impede or prejudice the executive authority of the Federation or endanger the continuance of Federal Government in Nigeria." Under such sections, the Supreme Military Council was empowered to act "with the concurrence of the Head of the Federal Military Government and of at least three of the Military Governors."

The series of measures and counter-measures in late May 1967 ended in the formal announcement of Eastern Nigeria secession. The declaration of a State of Emergency throughout Nigeria by Gowon on May 27 was, therefore, probably taken under the provision of Decree No. 8. But with the abolition

-
1. Sections 70 and 71.
 2. Sec. 86.
 3. As above.

of the Supreme Military Council at the same time as the declaration of emergency, all the powers to take any appropriate measures vested in him and the Federal Executive Council under him. However, if the declaration of a state of emergency throughout Nigeria and the abolition of the SMC had been taken without complying with the requirements of Decree No. 8, Gowon's action would have been unconstitutional but that point counts little in the situation.

Simultaneously with the declaration of emergency, Gowon brought political and civil figures into the Government at the level of the Federal Executive Council and the state Executive Councils. The experiment in mixed government has been successful. The political figures enjoy their new status as leaders by co-option. They still fulfil something of a political function, in that they make alliance and seek support and remain sensitive to local opinion within their own states and among potential allies. This had probably minimised the problem of working out some intermediate form between the full mobilisation of the masses characteristic of the politics of the old regime and the military bureaucratic insensitiveness of the Ironsi regime.

Nevertheless, Nigeria still has to work out the constitutional problem of return to civilian rule. The problem has been very much complicated by the tragic civil war which has more than emphasised the cleavages inherent in a multi-tribal state.¹

UGANDA. THE FIRST EAST AFRICAN CASUALTY:

The events which have apparently taken power from Dr. Milton Obote, President of Uganda, follow a pattern that is

-
1. Lt.Col.Ojukwu (as he then was) refused to accept the authority of Gowon on the ground that he (Gowon) and his supporters seized power "illegally" in the July counter-coup. He refused to accept Decree No.8 on the ground that it was a departure from what was agreed at Aburi, particularly, the emergency provision, which he insisted were not discussed at Aburi. He regarded it as an indication that the Federal Government intended to coerce the East into acceptance of Federal (which in his opinion is synonymous to Northern) Domination.

becoming all too familiar in the African Commonwealth. The pattern has two distinctive features, one the absence from home of the elected leader, and two, a position of personal leadership whereby it is possible by the removal of one man to change the fundamental intention of the whole society.

Both points were made in the removal from power five years ago of Dr. Kwame Nkrumah, first President of Ghana, when he was on an Asian tour. In what was almost a bloodless coup, the one strong point of resistance was in the Presidential guard at Flagstaff House where Dr. Nkrumah lived. This resistance would most likely have been a great deal stronger if Dr. Nkrumah had been in residence, and though it might not have altered the eventual outcome, the prospect of intense fighting would very likely have deterred the coup planners.

Dr Nkrumah's personal leadership role was in pursuing socialism of a fairly ideological kind. The breakdown in power seems to occur when the ideas of the individual leader carry him farther than he is able to carry the people. This is particularly notable among leaders inclined towards the left where recipes call for self denial in a situation where those in power clearly do have a high living standard.

Judging from early comments, the Uganda coup was the inevitable result of political repression, financial corruption and tribal animosity, only requiring Obote's absence in Singapore to make it successful. But Obote had been abroad before when these problems were even more acute and returned with his authority intact - particularly shortly after the exile of the Kabaka in 1966.

By contemporary African standards - and perhaps world standards, Obote's repression of opposition inside his country was perhaps not unusually excessive. He outlawed the opposition Democratic Party in December 1969, (but only after when it was alleged that the party had aligned itself with regional separatist tendencies and he himself had suffered a further assassination attempt. Obote's dictatorial behaviour turns out to have been less important in starting the coup than in providing his successor with another set of leaders to choose from.

Financial corruption itself does not really explain the present coup. Though by no means angelic in a financial sense, the Obote regime was only accused of financial misdemeanours by the successor regime after preliminary feelers by Amin had proved abortive. Then the main thrust of General Amin's displeasure was directed, not at excessive retention of profits by the Obote regime but at its plans for a wider distribution through partial nationalisation of local and expatriate-owned companies.

Tribalism has been suggested by several commentators as a major cause of friction in Uganda, both between the army and the people and within the army itself. But in this case, tension between the army and people upon cultural and linguistic grounds, the former containing a majority of Nilotic-speakers and the latter most of the Bantu ones, does not seem to have been particularly obstrusive. Indeed, a major aspect of the coup appears to have been an implicit alliance between these two groupings. Early reports speak of people placing banana leaves before army trucks, replacing photographs of Dr. Obote with ones of Sir Edward Mutesa, the

former Kabaka of Buganda who is now rumoured to be shortly reincarnated. If these reports mean anything, it is surely that "Nilotic" troops were welcomed rather than opposed by "Bantu" peasants in this particular coup.

Two possibilities are suggested as triggers. The first is the unwise remark Dr. Obote made in Singapore that if British arms were sold to South Africa he might not be able to guarantee the safety of British citizen in Uganda, a remark that was quickly countered by a close colleague in Uganda. The second is Amin's evident fear that he might be assassinated.

When President Milton Obote left for the Commonwealth Prime Minister's Conference in Singapore, it had been decided to remove General Idi Amin from his post as Army Commander. The citizens of Kampala Uganda's capital, expected a show down.¹ What came as a surprise was that at the end of the day it was not Amin who was ousted.

Obote's head of the secret police, Akena Odaka,² had over the last few years built up a vast security network in Uganda and had helped the President form a para-military unit called the Special Force, recruited mainly from Obote's Lango Kinsmen in the North. This force was specially picked to counter-balance the mainly Acholi army.

-
1. Obote has since confirmed this in his Press Conference in Dar-es-Salam where he said that he had called on Amin before he left for Singapore, to explain the growing numbers of weapons disappearing from army armouries and the increasing missing sums of money.
 2. He is Obote's Cousin.

While Obote was in Singapore, Mr. Ntende, the Permanent Secretary of the Internal Affairs Ministry also flew from Kampala to Singapore to report how the move against Amin was going. Amin was already suspicious and people in Kampala have asked the question why he did not seize power earlier. In fact Obote delayed his departure from Singapore by two days waiting to hear of Amin's downfall. The story has gained ground that Amin did not act until a loyal private Soldier came running with the news of an impending coup around midnight on Sunday. He then alerted the army units loyal to himself and started the well-known chain of events - twelve hours of fighting between the different factions of the army police and the Special Force.

Although Obote had declared some months ago that he was the African leader least susceptible to a military coup, he never really believed that, which is precisely why he tried to build up his own counter force to the army. Having been in charge of Uganda since its independence in 1962, he had had time to read the signs.

Back in 1966, when Obote ousted the Kabaka of Buganda, the King of the most populous region in the country, it seemed that he had finally triumphed over all opposition. He then abolished the traditional Kingdoms and passed a new Constitution that gave him full powers. The power which Obote gathered into his hands in 1966 and later was highly dependent on army support. His loyal ally in the Congo gold smuggling scandal and the Kabaka crisis which followed was Idi Amin whose loyalty was rewarded by the promotion over the head of the Senior Army Officer Brigadier Opolot who was suspected of anti-Obote sympathies. He was first removed from command and then detained.

By relying so heavily on Amin, Obote gave him power and opportunity to think for himself. In the years since 1966, intrigue and suspicion began to spread between the two men. When in December 1969 a Baganda attempted to assassinate Obote, hitting him with a bullet in the mouth, Amin significantly did not visit him but merely sent a message of condolence. One month later in January 1970 came the mysterious death of Brigadier Okoya, the second in command of the army and the man Obote was allegedly grooming for the top post. It was believed that his death was a political assassination.

The conflict between the two men deepened further as Obote and Odaka pushed ahead with the building of the Special Force and attempts were made to decentralise military control.

As Amin seemed to accept this position, Obote became increasingly confident and went on with planning to remove him while he (Obote) was away. The plan went awry. The crowd that spilled into the Kampala streets rejoicing were the Baganda still smarting from the loss of their King and the brutality of the use of emergency powers against their people and sympathisers. General Idi Amin seems to be safely in the saddle in Uganda. Though, he is a soldier, he could hardly have survived so long under former President Obote without learning the elements of politics. He is putting his knowledge to good use. He is conciliating the Baganda people whose broad support is essential to any stable Government in the country. The Army finally put down Baganda resistance upon Dr. Obote's orders in 1966, with bloodshed but evidently the Baganda do not bear a grudge against General Amin, then deputy Army Commander. They are relieved to see the Baganda

detainees emerge from confinement. Events have taken the Kabaka from them, and Obote's administrative changes preclude, at least for the moment, any attempt to re-establish a Buganda Kingdom within the country. General Amin can, therefore rebuild a contralised administration on Obote's undoubtedly important work but without the Baganda hostility which dogged him and led him to repressive measures. In fact, according to reports from the capital,¹ General Amin has announced that he will not restore the monarchies, but that the present republic of Uganda will remain, with himself nominated as the President. He has also announced that the army would remain in power for five years to enable them restore the country to its proper position - whatever that they mean.

To a considerable extent, the military regime is likely to take over the thinking of Dr. Obote, because it too will want to resist any recrudescence of tribalism.

The Amin coup has certainly changed the balance and seems to be a warning to all Uganda's neighbours. No doubt the General acted because he foresaw that he himself would be eliminated as a possible rival for power, nevertheless the condition for a military take-over had to be ripe, and they were. Dr. Obote had done great service to his country but his autocracy had finally made him too many enemies. In Uganda's neighbouring countries, Amin's advent is a reminder that if conditions become too difficult the army exists as an, alternative regime, or the means of introducing an alternative regime.

1. See Times (London) February 22nd. (Editorial).

C O M M E N T S:

The different forms which military intervention has taken in the examples taken from the newly-independent States of Africa within the Commonwealth indicate the shape of the contest for establishing a new kind of State. The first coup in Nigeria was organised by ad hoc groups of officers and men divided into "assassination squads", the Ghanaian coup of February 1966 was planned at Brigade headquarters in the North and carried out under the guise of routine piece of training. The political action taken within the army of Sierra Leone has been at three different levels: (1) by the Commander himself who on his own initiative prevented the Governor-General from swearing in a new Prime Minister; (2) by the groups of Senior Officers who overthrew their Commander in order to establish the National Reformation Council and (3) by the Senior Warrant Officers who renounced the policy pursued by the military rulers.

These examples, however, are sufficient to illustrate that the size of armed forces in relation to the total population of a country has little bearing on their liability to intervene in politics. Though the nature of a subsequent military administration is likely to be considerably affected by the number of trained men in uniform available to play administrative parts, Very few soldiers can, in the first instance, effect a coup especially if they are seeking primarily to deny power to a political tyrant or perhaps transfer power from one group to another. It is, of course, the possession of arms which gives them the capacity to do this. Arms, their use or very often only the threat to use them, are the sine qua non of military intervention.

The qualities of an army which give it the capacity to intervene in politics are, as it were, a form of reserve power existing within a State, the use of which is commonly regarded as unconstitutional or illegal. The term 'legitimate' as applied to Military action under considerable political provocation would, of course, be misleading in that the consequence is often necessarily the establishment of a regime which then has to discover a new basis for constitutional legitimacy. The fact that the action taken is legally unconstitutional¹ though in some cases it might reasonably be regarded as in the defence of the Constitution, is often disturbing to the Military Leaders responsible. The fact that General Ankrah tried to justify the Ghana coup by claiming it was not unlike a traditional 'destooling' of an unsatisfactory chief, confirms the nervousness. This aspect is clearly expressed by Colonel Afrifa in his book. He wrote,² "A coup d'etat is the last resort in the range of means whereby an unpopular Government may be overthrown. But in our case, where there was no constitutional means of offering a political opposition to one-party Government the Armed Forces were automatically made to become the official opposition of the Government."

It may be true that the Army is seen as the only means of firmly reconciling interests and co-ordinating the national effort when discord is dangerous to the whole fabric of society. This is a possible explanation for the relatively more frequent coup in developing than in developed countries, but whether this is any indication of the real basis for reduction is, however, highly questionable.

1. See Kelsen: General Theory of Law and State (1961 Edn.) pp. 117-118. (c) The Principles of Legitimacy; (d) change of the basis norm and (e) Birth and Death of The State as Legal Problems and at p. 220.
2. Afrifa, op. cit. at p. 31.

The charge of corruption and misappropriation is frequently made to justify military-coups in Africa as elsewhere. The question is not whether it exists but whether it is of any great importance in promoting such events. In a poor country or community conspicuous expenditure is an incitement to protest and violence on the part of those who are deprived. Thus, it may be that the late Chief Okotie-Eboh, Federal Minister of Finance in Nigeria, would not have been selected for abduction and murder if his financial manoeuvres had not appeared unusually reprehensible. The trap lies in the danger that the new rulers will become known to have succumbed in however marginal a way to the same temptations.¹

Once Civilian Governments have been ousted, the Leaders of Military intervention seek to justify their seizure of control. To "prove" that installation of an army regime was necessary is a first order of Business. But the newly installed rulers must go a step further, and proclaim their goals for the country. Possibly the most common theme sounded by the Military Leaders has been "national reconstruction". Though wording varies, the import remains identical: Politicians have failed to resolve the fundamental economic, political, and social problems confronting the State; only a transitional period of military rule can purge the political system of its inadequacies.

1. General Ankrah of Ghana was alleged to have received a bribe from a foreign embassy officials and there are rumblings in Nigeria of corruption among the top echelons of the Army.

Rhetoric must not be confused with probability of action, however, The promises of renovation and rebuilding may prove hollow. Can a military-based Government cope any more successfully with the difficulties which Civilian regimes encountered? The tendency to resort to violence exists in all Military - dominated Governments. After all, how else did the Military gain control? Devised to use force in the most efficient manner, armies may more readily turn to violence than to palaver, to repression rather than to compromise.

Security forces may be able to stand in at an emergency for any breakdown on the legal order but they usually find it difficult to create a new political order, therefore, difficulties arise from trying to keep in power or to find a formula for a return to civilian rule. The basic problem is that military administrations take office because of alleged defects of politicians and once there they may become aware of their own general superiority in this respect. There has so far been the remarkable case of Sierra Leone in April 1968, of the counter - coup of Junior Military Personnel organised allegedly purely to facilitate the process of "reciviliansation", though there has been in Ghana successful succession of the Military Regime by a Civilian Government.

The difficulty lies, it seems, in the process of deliberately organising the transfer of power and the crux of it is, perhaps in the revival of political parties. The banning of such parties has generally been the essential concomitant of Military rule, but it is hard to see how without them a civilian regime can be re-created. At the same time, the

essentially 'holding' nature of a Military Government makes it unlikely that the process can reasonably begin at a point of development very much different from that at which it was forcibly suspended.

It is notoriously easier for the armed forces to seize control than to give it up. Having taken the reigns of power in order to bring certain changes - a Government freed from corruption; an opportunity for wider political choice; an end to political meddling in military affairs - the ruling officers may be reluctant to return to the barracks without strong assurance that the civilian regime will not revert to its previous ways. Such assurances can never be absolute. Hence, the return to the barracks may be deferred again and again pending conviction on the part of the Governing military group that their reforms will not be undone. Having tasted the power, excitement and rewards of political life, officers may be personally reluctant to step aside. Second thoughts and procrastination about handing over to civilians thus become common phenomena. Withdrawal often does not occur through a simple desire to restore civilian rule, but through a transformation of the military itself.

Military withdrawal in simplest terms, comes about in two ways. First, governance leads to division within the armed forces. Torn between a professional ethic that respects civilian supremacy and a desire to protect professional autonomy by forestalling political interference, officers may fall into two camps, those who would carry forth the duties of the armed services by eschewing direct

political involvement, and those who would retain military autonomy by precluding significant civilian control. When the advocates of withdrawal gain the upper hand, withdrawal may occur. Second, over a period of time, a military government may so transform itself as to become practically indistinguishable from a civilian regime. Officers shed uniforms sometimes partially - for business suits; they participate in electoral campaigns, and thus build a foundation for legitimate political authority.

In Sierra Leone, for instance, withdrawal occurred after young officers and men in the ranks overthrew their superiors, who had earlier seized control from civilians. If Military regimes set themselves up as Doctors of the body politic, they risk being infected by the ills from which the previous civilian Governments suffered; or, should the patient fail to improve, the physician may be discharged. There is thus a dual danger. On the one hand, the Military Regime may fall prey to corruption, unwarranted use of force, the denial of political rights, - all weakness that helped justify, or at least rationalise, the toppling of the civilian Government. To avoid such "infection" the army may prefer withdrawal - e.g. as in Ghana. On the other hand, the popular welcome that may have accompanied the Military takeover may soon be exhausted. Accordingly, the pro-withdrawal group may force their colleagues to accept a retreat. Let us illustrate this by briefly examining Sierra-Leone.

The first coup in Sierra Leone grew out of the results of "democracy". After a bitterly contested election in May, 1967, the opposition African Peoples Congress (APC) apparently ousted the ruling Sierra Leone People's Party

(SLPP). When the leader of the APC., Siaka Stevens, had been sworn in as Prime Minister, however, Brigadier David Lansana intervened; in turn, he was supplanted within two days by a National Reformation Council (NRC) composed of young Officers drawn from all ethnic groups. Subsequently, the Dove-Edwin report and Government White Paper noted,

"The whole of the Government's arrangements for the 1967 election was rigged and corrupt they were determined to use all means fair or foul to win and remain in office and if all failed to get Brigadier Lansana to take-over(delay in reporting election results) could have developed into a tribal war if the National Reformation Council had not stepped in or March 23, 1967."¹

Publication of the Dove-Edwin report in December, 1967, provided strong incentive for the Sierra-Leone Military to withdraw. The Commission of Inquiry criticized the many ways in which the SLPP had attempted to ensure a majority, such as having returning officers declare APC nomination papers invalid and raising the required deposit by 150 per cent. In its commentary on the report, the NRC announced the appointment of a Civilian Rule Committee, whose terms of reference were explicit:

- "(a) The National Reformation Council has decided to hand over the Government of Sierra Leone to a Civilian Government.
- (b) The Civilian Rule Committee has been invited to deliberate and advise on the ff:

- (i) The necessity for a fresh General Election;
- (ii) If (i) above is in the negative, the method of forming a National Government; if (i) above is in the affirmative, the stages in which the handover should be effected;
- (iii) Any other action which the Civilian Rule Committee considers necessary to effect a peaceful handover."¹

These terms of reference foundered, however, on two unforeseen factors: growing unwillingness among members of the National Reformation Council to step aside, and the growing distaste for the NRC among the ranks. In what was described as a mutiny with political repercussions, an Anti-Corruption Revolutionary Movement led by Warrant Officers imprisoned all but two of the Commissioned Officers of the Sierra-Leone army and almost all Police Officers on April 17 and 18, 1968. The rebellious soldiers announced that the thirteen months interlude of army and police rule would end and civilian supremacy would return. As a spokesman for the Anti-Corruption Revolutionary Movement commented:

"Little did we realize that the people we had chosen to direct our nation's affairs were more corrupt and selfish than the ousted civilian regime.

It has since become absolutely clear that most of the so-called National Reformation Council members

1. Ibid. Col. 929C.

only wanted to benefit their selfish ends; the rank and file of the Army and Police have been ignored. All that was practised in both the Army and the Police were nepotism and blatant victimisation.

Fellow Sierra-Leoneans, we cannot continue any longer under such adverse conditions. The so-called NRC members have greatly mismanaged the nation's affairs. They have failed to fulfil their boastful promise to both Civilians and members of the Armed Forces. And above all, they want to remain in office indefinitely.

Soldiers and Police have no business in the running of this country. Our immediate aim is to return to Civilian Rule".¹

A National Interim Council was quickly formed by Army and Police Officers. Within 10 days, Siaka Stevens was sworn in as Prime Minister. Sierra-Leone returned to civilian rule still confronting ethnic tensions and economic vicissitudes that the NRC could not overcome.

The tendency of the Military and Police to intervene in the political arena again after handing over to a Civilian Regime depends in part upon the levels of competence and conflict in the new Political system and in part upon the orientations, interests and coherence of these institutional groups.

1. Africa Research Bulletin, v. No. 4 (1968) Col. 1035C.

There is at one level, a strong orientation against arbitrary Government and authority and for democracy. An awareness of this sentiment could help set limits to political behaviour by new political elites. But the orientation itself could also serve as a pretext for future intervention. Speaking to cadets at a passing-out parade at the Ghana Military Academy in late 1966, General Ankrah exhorted that "as professional soldiers we are not interested in politics, (but) our pre-occupation is to ensure that the people of this country will no longer be subject to the caprice and domination of a single political party or individual". This concern imposes "additional responsibility" on the soldiers as "guardians of the freedom and liberty of the people." ¹

Another primary military orientation is to order and stability; should evasion and violence attend political competition in the future, the military may well feel far more disposed to intervene than it did in the past, and with less excuse. Respect for politicians among the Military and Police is not high. The promises of politicians are suspect, their inability to fulfil them and their self-enrichment anticipated.

Lastly, since Military leaders assumed political authority, some have developed a taste for it. The now-established precedent of a Military route to political power in Ghana has already enticed some military men and will undoubtedly excite others. A funny thing happened on the way to Civilian Rule. At the last moment, the NLC

1. Ghana News, IV. No. 10, (Embassy of Ghana, London October, 1966), pp. 7-8.

asked the Constituent Assembly to reconsider a motion to substitute for the presidency for five years a Presidential Commission composed of the Chairman (Brigadier Afrifa) and Deputy Chairman (Harlley) of the NLC and the Chief of Defence Staff (Ocran). The Assembly agreed to do so for a period not exceeding three years and at the next Parliament's discretion. Thus, a core of the NLC stays in office, though Brigadier Afrifa has said that he will not go back to the Army after his term of office and both Police Inspector-General Harlley and Police Commissioner A. K. Deku have resigned their police positions. The NLC's reasons for pushing for this change are unknown.

There are no certain guarantees against Military intervention. The best assurance of civilian supremacy is a Government that can demonstrate that it has both popular and elective legitimacy and a high level of capability.

CHAPTER EIGHT.

C O N C L U S I O N .

In the preceeding chapters an attempt has been made to present a picture of the development of emergency powers, the variety and scope of emergency legislation and powers, the way in which they are provided for and exercised, the effect of the operation of emergency powers and the controls which the legislature and the Courts seek to exercise over them.

The development of emergency powers in the dependent territories of the British Commonwealth began in the early days of exploration with the necessity to protect not only the trading companies but also the early missionaries. The circumstances in most of Africa in the early days of the trading company rule necessitated the declaration of martial law on a number of occasions. There were hostile powers, for example, threatening the safety and public order of the possessions, further the people were inclined to rise in rebellion. It was, therefore, thought expedient to give the administration power to declare martial law. When British rule became officially formalised, the Governor in Council's ordinance making power included not only the power to declare martial law but also to make legislation during period of emergency to cover extensive fields. However, as we have seen, till around the time of World War I in 1914 the ordinance making power was not frequently used. After the second World War, the rise of nationalism intensified not only the enactment of emergency legislation but also the use of emergency powers to curb violent nationalist activities.

At independence, all the African States within this area of study had inherited the colonial legislation on emergency, viz, the Emergency Power Orders-in-Council 1939 - 1956, and most of them also had other public security measures conferring emergency powers on the executive at such times when it is considered that the security of the state is endangered; in the latter cases, a state of public emergency need not necessarily be proclaimed.

The use that has been made of emergency powers, as in colonial days, has been mainly directed at alleged anti - government activities or suspicions of anti-Government activities. The situation and circumstances which justified the colonial administrators in providing for and using emergency powers still exist, as has been shown, in the newly independent states. Admittedly, the use has been more intensive and there is no doubt that instances have been frequent where emergency has been conjured up in order to use emergency powers to bolster the use of naked force for purpose other than genuine preservation of national security. For when the power of preventive detention is used to wipe out an organised Opposition Party or to create a single - party State so that absolute power may be concentrated in the hands of one man, the President, one is bound to feel that the security of the State may not be the only and perhaps the primary consideration.

Emergency powers have become a permanent feature of maintaining law and order and have virtually superceded the ordinary laws of the land in some of the States. Various excuses have been given for this state of affairs. But

emergency powers have been designed for and meant to be used when an emergency occurs. If there is a genuine emergency, then the Government should and ought to be able to rely on and use these powers simply because the situation would be such that the ordinary criminal laws may not be effective. But the important consideration is that the emergency should be genuine. All the constitutions of the African States under study make provision for the declaration of emergency and bringing into operation of emergency powers for this purpose. If there is a genuine emergency, surely this provision would ensure that the Government had authority and power to deal with it. The safeguard of the approval of the majority of the representatives of the people in Parliament would ensure that no government took emergency powers without the people being assured of the justification for it. But if the emergency is imagined, then the people through their representatives may prevent any rash actions by the Government.

Unfortunately, with the introduction of preventive detention legislation and public security bills, the government may now take and use emergency powers at any time without any proclamation of emergency being made in accordance with constitutional provisions.

The International Commission of Jurists formulated four principles to which an emergency must be subjected.

The four principles are:

- (1) A State of emergency should be declared only where circumstances make it absolutely necessary to do so in the interests of the nation.

(2) The period of emergency should not be prolonged further than is absolutely necessary.

(3) Restrictions placed on fundamental rights and freedom should be only such as the particular situation demands.

(4) The legality of emergency legislation and emergency orders should be subject to review by the ordinary Courts of the land.¹

Acceptance of these principles would mean providing effective checks over the emergency powers of the State, without necessarily prejudicing the interests of State security. While most of the African States have drafted their emergency provisions with these four principles in mind and incorporated them, the effect is much reduced when the same states also have enactments under which emergency powers may be assumed without a proclamation of emergency. The normal powers of any Government are surely wide enough to permit the State to carry on its security precautions and defence with speed and efficiently. Neither the provisions of the Constitution nor the fundamental rights guaranteed by it are capable of causing any serious impediment to the security efforts of the State. As and when the State feels compelled to resist subversion, a proclamation of emergency can be issued.

The threat to citizen's rights is great enough where and when there is a proclamation of emergency and use of emergency powers in spite of all the safeguards. Where there is no such declaration or proclamation, it is even greater when emergency powers can be used in non-emergency times, without the limitations and safeguards attached to a proper emergency proclamation.

1. The Dynamic Aspects of the rule of Law in the Modern Age, (1965) p. 42.

The best situation is obtained in a country which has no preventive detention legislation at all in times of peace. When a government feels obliged for reasons of security to invoke preventive detention legislation, however, then such legislation must be hedged with reasonable safeguards to ensure its proper and not indiscriminate use by the Executive. Reasonable safeguards would include the right to make representations to the authority concerned and the right to appear before an independent tribunal. There should be opportunity for judicial review: the Courts should always be able to inquire, in times of peace at least, into the grounds of detention and decide whether they are adequate, and the objective rather than the subjective test should be followed. A final safeguard would be for the legislature to receive regular reports from the Executive or through Ministers, of the number of persons detained and of occasions when the Executive have and have not followed the advice tendered by the independent tribunal. None of the African States which have enacted preventive detention legislation has all of these safeguards and some have none.

In virtually every newly-independent African State, independence was granted to a government endowed with popular support. Under the circumstances, courts charged with enforcing limitations on governmental power, having no comparable popular political support of their own, were cast in an exceedingly delicate role. In Ghana and Tanzania, the Constitution substantially stripped the Courts of any role in umpiring the constitutional process, preferring the risky theory that fundamental rights and duties "are most equitably

disposed in a democratic society where the government is responsible to a freely elected Parliament representative of the People"¹

Thus, where the judicial role was to be preserved, there are clearly advantages to (i) circumscribing the limits of fundamental rights with clearly-stated if elaborate exceptions giving the political arm of government those powers necessary to the operation of a new and frequently volatile society and (ii) arming the judiciary with detailed, specific formulations on which to base a politically-unpopular confrontation with other branches of government.

It is in this connection interesting to note that in no new nation of the Commonwealth except Ghana, during Nkrumah regime, has independence or revolution brought about either a curtailment of judicial functions or a significant diminution of judicial prerogatives. This is no doubt, in part, because the role of the judiciary has from the beginning been comparatively strictly defined and comparatively strictly limited. Whatever may be the position in a future situation, it would seem unreasonable to urge the Courts of the newly-independent nations into decisive confrontation with the politicians. A Marbury v. Madison² confrontation has been avoided in the

-
1. Preamble to Interim Constitution of Tanzania No. 43 of 1965.
 2. (1803) 1 Cranch., 137 Marshall C.J. stated "It is emphatically the province and duty of the judicial department to say what the law. Certainly all those who have written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be that an act of the legislative repugnant to the Constitution is void."

African States, in part, because the role of the judiciary has from the beginning been more exactly defined and, in part, because the Judges wisely have not sought to engage the politicians in a power polemic. President Nyerere of Tanzania has said "our constitution differs from the American system in that it avoids any blurring of the line of responsibility, and enables the executive to function without being checked at every turn. For we recognise that the system of "checks and balances" is an admirable way of applying the brakes to social change. Our need is not for brakes - our lack of trained man-power and capital resources, and even our climate, act too effectively already. We need accelerators powerful enough to overcome the inertia bred of poverty, and the resistances which are inherent in all societies."¹

But conflict between the judiciary and the executive or legislature cannot always be avoided as has been shown in the recent conflict between the Supreme Court of Nigeria and the Federal Military Government in the case of LAKANMI vs. THE ATTORNEY*GENERAL (WESTERN STATE) & ORS.² when the extent of the power of the Government to abrogate by decree the fundamental human rights of a citizen was challenged. The Government was forced to reassert its right to unfettered and unlimited legislative authority to the extent, if it wished, of over-riding any or all of the recognised and

-
1. Nyerere, "How Much Power for a leader", London Observer, reprinted in Africa Report, July, 1962.
 2. S.C. 58/69 - Already discussed supra chap. 5.

entrenched fundamental human rights.¹ But the citizen's rights should not be sacrificed to avoid such conflict, particularly during an emergency or the operation of emergency powers. Although politicians and even military leaders of revolutions such as those of Zanzibar and Nigeria have gone out of their way to reassure the judges of their complete freedom to administer law impartially, Dr. Nkrumah's political dismissal of his Chief Justice², and more recently the resignation of the Chief Justice of Zambia³ are all indicative of the type of conflicts that can arise from a politically charged issue. The use of emergency powers in Africa, as we have seen, has been mainly against political opponents, and any cases for the determination of such person's rights can give rise to a politically unpopular confrontation. It is, therefore, suggested that another body or tribunal might be charged with the determination of issues arising from use of emergency powers. It is already provided that an independent tribunal should review emergency detention, perhaps the function of such a tribunal should cover other powers. Also the use of the tribunal might be more effective if its decisions are not only obligatory but binding on the executive. This should not, however, be in substitution of the power of

-
1. It did this by promulgating, a few days after the judgment of the Supreme Court, a Decree titled "Federal Military Government (Supremacy & Enforcement of Powers) Decree No.28 of 1970" Which restated that the Courts are prohibited from entertaining any question as to the validity of any Decree or Army Edict.
 2. In 1963 following the decision in the Treason Trial Case.
 3. In 1969 following the detention and trial of two Portuguese infiltrators. See Keesing's Contemporary Archives, 1969.

judicial review of constitutionality of statutes and enactments. There are precedents for this, e.g. in the Ghanaian Special Court and the German Bundesverfassungsgericht.¹

The Constitutional and institutional safeguards to emergency should be sufficient to ensure that emergency powers are not abused but it has been shown that in actual practice, they are not. The entrenchment of rights may not mean much, since most of them can be derogated from in an emergency, howbeit by measures which are "reasonably justifiable", the use of that phrase or similar phrases provide a standard which, properly applied, serves as an indispensable check on capricious and officious disregard of private rights by bureaucrats. In de jure and de facto one-party states, the requirement of a special majority for constitutional amendment is not an adequate protection, and in such states, it is not difficult to imagine that the Constitution may not remain sacrosanct from the hands and ambitions of a power hungry leader. It is, however, impossible to suggest a 'fool-proof' safeguard to abuse of emergency powers. Perhaps the best safeguard would still be the power of the people to control their own destiny when they find, probably at the instigation of a minority, that they are no longer happy under a totalitarian Government.

-
1. Art. 100(1) of the German Federal Republic Constitution 1949 provides: "If a Court considers unconstitutional a law the validity of which is pertinent to its decision, proceedings are to be stayed, and a decision is to be obtained from the land Court competent for constitutional disputes if the matter concerns a violation of the constitution of the land or from the Federal Constitution Court (Bundesverfassungsgericht) if the matter concerns a violation of this Basic Law."

The interference of the military into politics has probably indicated one method of effecting change. But the question still remains whether the military is competent to cope with the various political and administrative problems which are inherent in the efficient running of government machinery. The intervention of the military in politics in modern Africa, however briefly, probably indicates that while the Army is the convenient agent for the suspension of activities in a deteriorating situation, it is inherently unsuited for the task of political reorientation, and when it fails even for a time to "clean-up" the administration it may become a force tending to encourage instability rather than the reverse.

Independence, as the nationalists have always insisted, makes a lot of difference. It transfers much of the effective power to individuals and structures internal to the country. It gives the governing elite many levers to reclaim still more power from outside agencies. There are, however, many claimants to the exercise of this power, all internal to the country. Unless the power is effectively exercised by a central agency, and unless the rules of the power game are generally accepted by all the competitors, disintegration and secession become not merely possible but probable.

All newly-independent Anglo-phonic African States do not have long histories as nations. Their nationhood has been created in the crucible of a revolutionary struggle against a colonial power. The unity of the nation was forged in the fight against the external enemy. Colonial governments bred their own dissolution and nationalism came about as a resolution of many of the basic strains of the colonial situation.

The government of a new nation, immediately after independence, is a very unstable thing. For one thing, the existence of an external enemy-the major motivation for unity in the nationalist movement has largely disappeared. The political mobilization, the subordination of private and sectional claims to the needs of the whole, is inevitably diminished. The country's sense of tension, and of antagonism, is partly abated, partly turned inward. Moreover, there is a sense of disappointment at unfulfilled expectations.

In nationalist activity in Africa there was an implicit promise that the tension resulting from oppression and antagonism, from the restraints of the colonial ruler and from the discipline of the nationalist organisation would be temporary. There was a touch of the utopian hope characteristic of every revolution, even when nationalist movements were peaceful and unmilitant, as they were in some of the African States that gained independence. And there were many in all the African States who thought that freedom meant the end of social control or the immediate redistribution of wealth. The cadre of the nationalist parties may not have had such naive expectations, but it is understandable that among the peasants and uneducated urban dwellers such illusions existed. Even if these illusions were only momentary, unfulfilment meant a sense of disappointment. Independence was not magic. In country after country in Africa, during the first few months of independence, the leaders felt the need to make speeches on the theme that independence means hard work and self-reliance.

The removal of the prod to unity, that is, colonial rule, combined with disillusion, and hence opposition, created by the new government inevitably causes the ethnic, regional and

other particular interests which had temporarily held back their claims to reassert them. The assertion of the rights of private interests to their share of the community's assets is the business of all Governments, not only those in Africa. What is different in the new nations is that the government cannot assume a residual loyalty to the state among the majority of its citizens.

The independence governments saw as their earliest tasks the promotion of national unity and the raising of living standards. The first of these was the more pressing, since political solidarity and stability were the prerequisite for any genuine economic advance. The geographical units over which the new governments were to rule were in every case essentially artificial creations carved out of Africa by the colonial powers in the late nineteenth century. Only rarely had the European administrations paid much attention to ethnic considerations in delineating the new frontiers. Yet the new leaders felt compelled to create a sense of national identity within the existing frontiers, because to try to change the existing borders would only increase the divisive forces inherent in long-standing tribal enmities which in some countries already threatened to destroy the new nation.

The national political parties sought to minimise the effects of these forces by exploiting the wave of enthusiasm which accompanied independence. To reinforce the sense of national community as well as to give the individual citizen a sense of participation in the great work of national development, self-help schemes were organised, frequently based on the same tribal societies that had served earlier as party nuclei.

The enormous reservoir of collective energy which had been marshalled for the independence struggle had now to be channelled into activities which would produce the concrete improvement in the lives of the people which had been promised as the aftermath of political independence.

The tasks facing the new governments were staggering. The day-to-day problems of administration were complicated by the departure of many key colonial administrators, and even to keep a bare minimum of governmental services in operation men with little or no experience were called upon to replace them. Even in countries such as Nigeria, where preparation for independence had been under way for some years, Africanisation of the civil service was far from complete. The governments were called upon immediately to make decisions on both internal and external policies for which virtually no planning had been done.

Confronted by circumstances and pressures coincident with independence, it is not surprising that the leaders of the African States found little time to reflect on the establishment of the democratic process and on the place of an opposition in the domestic political spectrum.

The Western-style institutions of parliamentary government created by the British have in many of the countries been eclipsed by the continuing phenomenon of the single party. Africans are insisting that while they might build on some parts of the European foundation, their ultimate goal was to devise institutions which would be more suited to the African conception of the functions of government and which would correspond more closely to the traditional African style of policy (~~political~~) decision making. The single-party system

which was the product of the mould into which nationalist politics fitted prior to independence was thus carried over into post-nationalist politics to the point where it has become the single most characteristic feature of the contemporary African scene.

With few major exceptions (such as Nigeria and Kenya) single parties dominate the governments of all the newly-independent African States. They are for the most part those parties which came to power at independence and have many of the same leaders who were most active in the earlier nationalist period. These are the parties which were able to construct the most effective organizational net works before independence and which have been able to maintain wide national support through their local branches since. Although they go through the motions of periodic elections, there is no effective opposition in an institutionalised form and hence elections serve only as a method of reaffirming the solidarity of the nation behind the existing leadership.

African arguments supporting the single-party system are based on both pragmatic and theoretical grounds. The pragmatic justification derives from the view that in the crisis following independence a strong government is needed to weld the nation together. The needs of economic development are imperative and eviuent; there can be no argument about goals and therefore parties representing different points of view are superfluous. The single-party, it is claimed, represents the will of the people. It permits mass participation in decision making and in so doing encourages the development of a sense of personal responsibility in government. Moreover, since it does not represent only the

interest of a group or section of an economic class in the population, it is basically more democratic than the Western multi-party system.

Western critics of the single-party system in Africa have argued that instead of promoting democracy it has given rise to dictatorship which refuse to permit the formation of an opposition party, or in those few cases where an opposition exists, have not permitted it to play its rightful role as the continuing critic of government policy. It does not necessarily follow, however, that the future of democracy in Africa would have been more ensured had the African majority parties allowed full rein to opposition parties within a parliamentary structure. Underlying the argument for an opposition is the implicit assumption that a Western-modelled Parliament is applicable to all societies regardless of their cultural back-ground.

In those African states where opposition parties were permitted to exercise their prerogative freely after independence, it rapidly became clear that the concept of the "loyal opposition" was by no means clear to the opposition leaders. They appear to have felt that their role was not that of offering constructive criticism but rather of seeking the downfall of the government by being as destructive as possible. There is certainly some truth in the complaints of the majority party leadership that the opposition regarded its chief function as that of hampering the government in carrying out any policy whatever, nor did the opposition feel that the onus of providing alternatives to the programmes it criticised fell upon its shoulders.

While there is no doubt that some governments have repressed opposition movements beyond any point justified by the oppositions activities, there is no proof that the opposition, had it been in the same position would have acted differently. All too often the opposition leaders have made it apparent that their goal in seeking office is for the sake of power alone (to the point where they have not hesitated to seek to overthrow the government by force if they felt that an appeal to the voters would fail) and not to provide better solutions to the problems of government.

In a recent speech, President Julius Nyerere of Tanzania made the point that it was of vital importance that in a new state the institutions of government be understood by the people. If they are not, they cannot hope to encourage national unity. Nyerere's point is well taken. The Western nations have taken generations to develop those political institutions which they feel will best serve their needs of their societies, and the process is by no means finished. The Parliaments and parliamentary forms devised by Britain and ceded to the colonies in Africa, were developed as a felt response over the course of centuries to the needs of European societies. It is not to be expected that these institutions will always meet the needs of African societies, whose traditions and back-grounds differ from ~~their~~ own. President Nyerere went on to add that for his own country;

"There must be no confusing outward forms which are meaningless in the light of our own experiences in history. This alone requires a Republic, and one with an executive President. To us, honour and respect are accorded to a chief, Monarch, or a President, not because of his symbolism but

because of the authority and responsibility he holds. We are not used to the division between real authority and formal authority.

The President must not only carry the responsibility for the actions of Government, he must have power to fulfil his responsibilities The Government are aware that some of our friends may be overconscious of the dangers of dictatorship, but they recognise an over-riding need to provide leadership.

We have to acknowledge that although the people of Tanganyika can understand the idea of law being made by groups, they see leadership and enforcement of law as the responsibility of a person, with authority, answerable for his actions to the group but not hampered by it in effecting them. Under our proposals therefore, ~~where~~ it is necessary to lead, the President has the powers to lead."¹

President Nyerere went on to emphasise, however, that within this structure of the strong Executive, Parliament must remain sovereign and expressive of the will of the people. Yet the sovereignty of Parliament does not, in his view, necessarily mean the existence within it of a two-party system since, as he contends, "where one party is identified with a nation as a whole, the foundations of democracy are firmer than they can ever be when you have two or more parties, each representing only a section of the community." While he recognizes that the checks and balances provided by the party system and those built into the constitution in the American presidential system are necessary to preserve democracy in a developed country, in the case of the African developing nations such a system of brakes on social change

1. Quoted in Africa Report, July, 1962, p. 5.

is unnecessary. "Our need is not for brakes - our lack of trained manpower and capital resources, and even our climate, act too effectively already. We need accelerators powerful enough to overcome the inertia bred of poverty, and the resistance, which are inherent in all societies."

The outside world has been prompt to lay the blame of what appears to be the growing political instability of the African states at the door of the one-party system. The argument is that the attempts by the governing parties to satisfy all sections of their population have not been successful. The dissatisfactions engendered have led to such frustrations on the part of the opposition, which has had no legitimate outlet for its grievances, that they have culminated in repeated attempts to overthrow the governments by force. So endemic have these attempts become that a prominent African newspaper had, in mid 1963, begun to run a column entitled "The Plot of the Week."

The succession of plots aimed at overthrowing the governments in such countries as Uganda, Malawi, even when they have failed, exposed the African single parties to the charge that in their haste to legitimise themselves and to push ahead with national development they have only laid the foundation for chronic instability.

In some degrees, a part of the instability which plagues many African States is the result of a clash between the Western - inspired parliamentary system and the indigenous consensus democracy. But the newly-independent African States suffer also from a built-in instability which derives fundamentally from the rapid process of modernisation.

The rise of nationalism, the drive toward independence, and finally the stage of independence itself have profoundly shaken the foundations of African society. The vast movement of population from rural to urban areas, the spread of education and technical training, have combined to create a world in which new anticipations and ambitions may be realised but which at the same time has within it complexities and uncertainties that were never faced in traditional society. In government many new types of authority have come into being; one day a man may be a farmer in his field and almost the next day, a member of Parliament, or a Minister. The expansion and Africanization of the bureaucracy have created new decision-making and positions of influence at the local community level have sprung up within the hierarchy of the nationalist parties. Economic development has created new roles for the African entrepreneur out of which grow ever more complex patterns of roles which combine the authority of the new wealth with that of a high position within the political party. The foundations of a highly stratified and multi-dimensional modern society are slowly being laid alongside a structure of traditional society which has by no means lost its vitality. The conflicts between the authority resulting from these new roles and that from traditional roles, and the jockeying for power which is an inevitable part of the still-limited opportunities offered to the growing educated elite, create a social instability which becomes readily reflected in the political process.

No matter what their education, or the degree to which they have been acculturated to a Western tradition, the leaders of many of the new States have deep, underlying doubts as to whether they and their people can measure up to the challenge of a modern technological world. The insecurity bred of this lingering doubt of the ability to achieve modernisation provides a rationale for continued control of the political process through the single-party system. In British Africa, Kwame Nkrumah ex-President of Ghana has urged that the economic independence which gives substance to political independence can be achieved only by the welding of national unity. Respect for the new Nations of Africa, he insists, will only come in international community when they have proved that they are capable of completing as modern states with the States of the more developed parts of the World. To ensure full mobilisation of the society behind the drive to create a new nation, a high degree of control in the immediate post-independence period is necessary. Under the psychological pressure resulting from the often over ambitious goals of the leaders, the nationalist party becomes increasingly impatient of criticism and of what it considers obstructive tactics, and in the process, even genuinely constructive critics may find themselves the victims of Preventive Detention Legislation. Unfortunately, the leaders have given little consideration to the possible long-range consequence of the loss of individual liberty which the drive for national identification entails. Their aim, as they see it, is to proceed as rapidly as possible with the transformation of society while trying to keep in check those forces of dislocation created in the process so as to prevent them from tearing asunder the very framework of the society itself.

It is this precarious process of balancing change against stability that has often resulted in the greater reliance on emergency powers by the leaders of the newly-independent African States.

While there may be some validity to President Nyerere's argument that a strong form of government is necessary for Africa at this stage, and that it corresponds to the desire of the majority of the people, the fact cannot be brushed aside that experience over the past few years of African independence has indicated that a strong Executive may well assume dictatorial characteristics in the haste to achieve the progress which is so often seen as the primary need necessity. The tragedy of Africa is that the urgency of the need to release the brakes on social change has all too often led to the personalisation of power. It can of course, be argued that in the colonial period power was personalised in the hands of the Governor, whose position had a generous element of authoritarianism built into it. Yet in the last analysis his powers were never absolute. Clearly there is danger inherent in placing full constitutional authority in the hands of one man even for a temporary period. The degree of danger, however, depends on the personality of the individual in whom the powers are vested. If the personality of the leader is such that the possession of power becomes for him an end in itself without regard to popular consent, he will resist the surrender of that power to the point where he can only be displaced by an act of violence. The delusion of omnipotence can frequently be far more perilous to the state than the personal exercise of supreme power in a period of national crisis such as prevails in many of the newly-independent African States today.

It is clear that heavy emphasis is being laid in African political systems on those values which tend to solidify and integrate the community and less upon the individualism. In consequence, therefore, there has been less concern with civil liberties and the protection of the individual under the rule of law than the West is accustomed to. Within the traditional African village, the rights of the individual, as well as his privileges, were regarded as distinctly secondary to those of the community and family. The individual who, by his actions, endangered the solidarity or the continued existence of his extended family and of the families who made up the community rendered himself liable to the ultimate sanction, that of being cast out of the group. His life depended on the support of those around him; in turn they claimed the right to prescribe, often very narrowly, the confines of his liberties as an individual. The new community of the nation state is only now in the process of creation. Its foundations are fragile and the consensus upon which it is being built is not always secure. Acts which threaten this consensus threaten the state and will be harshly judged by the new leaders, more particularly so if they appear to favour the interests of an individual or a group to the detriment of the people as a whole. So long as the leadership feels itself engaged in the struggle for legitimization of its existence, and even for the existence of the nation itself, it will continue to insist on the use of emergency powers and justify such use by pleading necessity for strong-arm government.

In the colonial situation, African nationalist movements had taught their followers to think of the state as "they" not "we". Independence demands a rapid reversal in out-look from

opposition to support of the State's authority. This transition is difficult even for the educated and trained cadres of the movement. In several of the newly-independent African States within the Commonwealth, we find governments inveighing against bureaucrats who have not learned that "sabotage" is no longer a legitimate tool of argument, that the anarchy which nationalists had demanded before had now become archaic and dangerous. The governments thus feel themselves forced to achieve a reorientation with as little waste of time as possible. Loyalty to the State is measured by the sense of self-restraint which its citizens feel in pursuing their opposition to specific policies of the government. If they oppose the particular government in power but stop at a point short of destroying the state or seriously weakening it, they can be said to be loyal. This kind of legitimation of the state rather than of a particular government is something that is inculcated in the population over a period of time. All the newly-independent African States have hardly had time for this. When they achieve this state of development, there is surely bound to be less tendency in seeing every opposition to government as part of a plan towards the disintegration of the nation and hence less need for repressive emergency measures. The problem of establishing the integrity of the State is precisely that of strengthening the hand of the State.

Democracy in most of the newly-independent African States is still a top dressing on a soil. The average man is not really obsessed with the notion that government is his business. He is apt to endorse Pope's couplet, if a slight emendation is adopted.

"For forms of government, let dons contest,
What ever is best administered is best".

What he wants is not so much democratic government as good government which will provide him with the necessities of life and probably a few comforts too. Thus the economic condition of the masses tend to tilt the balance against the way of life. From "Aristotle down to the present, men have argued that only in a wealthy society in which relatively few citizens lived in real poverty could a situation exist in which the mass of the population could intelligently participate in politics and could develop the self-restraint necessary to avoid succumbing to the appeals of irresponsible demagogues"¹. A society divided between a large improvised mass and a small favoured elite would result either in oligarchy or in tyranny. "It is possible that Max Weber was right when he suggested that modern democracy in its clearest form can only occur under the unique conditions of capitalist industrialisation"². African States are still in the process of developing and raising their economic levels.

It is against this background that the provisions for and the use of emergency powers in British Africa must be viewed. It is true the boundary between the curtailment of civil liberties during a crisis in accordance with constitutional provision and their abrogation by a dictator relying

1. S. M. Lipset, *Some Social Requisites of Democracy*,
The American Political Science Review, March 1959. p. 59.

2; Ibid.

only on his political power is easily crossed, but perhaps it is one of the growing pains which the developing nations must unavoidably suffer. There may be plenty of reasons for seeing difficulties but none for disillusionment.¹ The replacement of the personalised and often authoritarian aspects of the newly-independent States in Africa is bound to come. Africa is still in search of the type of the system most suitable to its needs. The search for and building of a democracy that does not rely on emergency powers to maintain its national integrity and security cannot be completed without false starts.

1. Basil Davidson "Difficulties, Not Disillusionment" in Africa Report Dec., 1967 p. 27.

1

L A W R E P O R T S

A. C.	-	Appeal Cases (ENGLISH)
All N. L. R.	-	All Nigeria Law Reports
W. L. R.	-	Weekly Law Report
G. L. R.	-	Ghana Law Report
E. A.	-	East Africa Law Report.
L. L. R.	-	Lagos Law Report
W.N.L.R.	-	Western Nigeria Law Report
All E. R.	-	All England Law Report
State Trials	-	American Reports.
N.R.N.L.R.)	}	Northern Region of Nigeria Law Report.
or		
N.N.L.R.		
A.I.R. (S.C.)	-	All India Report (Supreme Court).
K. B.	-	King's Bench (ENGLISH)
Ch.	-	Chancery Report (ENGLISH)

TABLE OF CASES

Adegbenro v. Attorney-General of the Federation & Ors.....	
129, 202, 222, 244. /I962/ 1 All N. L. R. 338.	
Chief A.M.F. Agbaje v. Inspector-General of Police and Director of Nigerian Prison Service <u>Suit No. M/84/69</u>249, 255, 266, 291.	
Akintola v. Adegbenro /I962/ W.N.L.R., /I963/A.C. 614 (Privy Council)122. 310.	
Akintola v. Governor of Western Region of Nigeria /I962/ W.R.N.L.R. 158., /I963/A. C. 314 (Privy Council278.	
<u>Arzika v. Governor</u> , Northern Nigeria (1961) N.R.N.L.R. 67 ...216	
Attorney-General v. Katherine Njoroge /I961/E.A. 348.....	
Awolowo v. Minister of Internal Affairs /I962/L.L.R. 177...210	
Balewa v. Doherty /I963/ 1 W.L.R. 949120	
Barnard v. Gorman (1942) A. C. 378231	
Bawditch v. Balchin (1850) 5 Ex. 378231	
Campbell v. Hall (1880) 6 App. Cas. 143	
The Case of the Five Knights (1627) 3 State Trials. 1.....	
Cheranci v. Cheranci /I961/1 All N.L.R.382216, 277, 278	
Chike Obi v. Director of Public Prosecutions /I961/All N.L.R. 182192, 243.	
Christie v. Leanchinsky 1952 A.C.304.	
Gokpa v. Police /I961/ 1 All N. L. R. 423210	
Gokpalan v. State of Madras. A.I.R. 1950 S.C. 43274	
Grace Ibingira v. Uganda /I966/ E.A.A.R.306237	
Greene v. Secretary of State /I941/3 All E.R. 370218	
Land Realisation C. Ltd. v. P.M.G. (1950) 1 Ch. 434271	
Liversidge v. Anderson /I942/ A.C. 20696, 203, 214, 215, 217, 218, 226, 235, 248, 273, 316,319	
Makhan Singh v. State of Punjab A.I.R, 1964 S.C. 381....318.	
Marbury v. Madison(1803) 1 Cranch 137 253, 280.	
Ex Parte Milligan (1886) 4 Wal. 2. 121298, 316.	
E.O. LAKANMI & ORS. v. THE ATTORNEY-GENERAL (WESTERN STATE & ORS) 1968 C.A.W.35/68 (Unreported)....255, 379.	

Nakkuda Ali v. Jayaratne (1951) A. C. 66	204, 232.
N'Juma v. Republic of Tanganyika /I964/E.A.L.R. 107	199.
Olawoyin v. Attorney-General for Northern Nigeria /I960/ N.R.N.L.R. 23	215, 243.
Ogunlesi & Ors. v. Attorney-General of the Federation(1970) L.D./28/69 (Unreported)	268.
Adamolekun v. The Council of the University of Ibadan (1967) S.C.378/1966 (Unreported)	268.
Ram Krishna v. State of Delhi (1935) S.C. 318....	218, 242.
Re Akoto & Ors. /I961/ G.L.R. 523	187, 274, 299.
Re Okine & 42 Ors. /I960/ G.L.R. 84	271.
R. v. Earl of Crewe ex Parte Sekgome (1910)2 K.B.576....	205.
R. v. Governor of Wormwood Scrubbs Prison (1920) 2 K.B.305.....	
Rex The King v. Halliday (1917) A.C. 260 ex parte Zadig.....	252, 276, 304.
Sobhuza II v. Miller /I926/ A. C. 518	
L.T. Swanear v. Commissioner A.I.R. 1952 Mad. 613	297.
Uganda v. Commissioner of Prisons, Ex parte Matovu /I966/E.A.L.R. 514.....	217, 233
Van der Pujie & 4 Ors. /I961/ G. L. R. 733.....	272.
West Virginia State Board of Education v. Barnette 319 U.S. 699.....	276.
Williams v. Majekodunmi /I962/ All N.L.R. 324....	117, 118, 188, 202, 217, 244, 248.
Mairaj Muhammed Khat v. Government of West Pakistan.....	318
United States v. Butler 297 U.S. 1.....	280.
R. v. Common Row Police Station Inspector ex Parte Brady...	252.
R. v. Secretary of State for Home Affairs ex Parte O'Brien (1923) A. C. 603.....	252
State of Bombay v. Atmaran (1951) S.C. 157	242.
Singh v. Delhi 16 Supreme Court Journal 326	253.

S T A T U T E S .

BRITAIN

1. Emergency Powers Act, 1920.
2. Emergency Powers (Defence) Act, 1939.
3. Habeas Corpus Acts 1862.
4. Supplies and Services (Transitional Powers) Act 1945.
5. Supplies and Services (Essential Powers) Act, 1947.

COLONIAL LEGISLATION

1. Charter of the British South Africa Co. Oct. 29, 1889.
2. Collective Punishment Ordinance 1909 of Nyasaland
3. Criminal Code (Amendment) Ordinance 1934 Gold Coast.
4. Deportation Ordinance 1934 of Sierra Leone.
5. Emergency Powers Order-in-Council 1939-1956.
6. Immigration Act, 1958 (Nigeria).
7. Incitement to Disaffection Ordinance 1934 of Sierra-Leone.
8. Kenya Constitution (Amendment) (No.2) Order-in-Council.
9. Order-in-Council Protectorate of South Africa May 9, 1891.
10. Preservation of Public Security Act, 1960 Kenya.
11. Preservation of Public Security Act, 1960 Malawi.
12. Uganda (Independence) Order-in-council 1963.
13. Undesirable Literature Ordinance 1934 of Sierra Leone.

G H A N A

Emergency Regulations 1961.

Preventive Detention (Repeal) Decree 1966. N.L.C. Decree No. 30.

Protective Custody Decree 1966 N.L.C. Decree No. 2, 1966.

Emergency Powers Act, 1957.

Criminal Procedure Code 1960.

Emergency Powers Act 1957 and 1961

Preventive Detention Act, 1958, 1961, and 1964.

Constitution (Repeal of Restrictions) Act 1958.

Independence Constitution 1957.

Republican Constitution 1963.

The Deportation (Othman Larden and Ahmadu Baba) Act, 1957.
 Criminal Procedure (Amendment) Act, 1961.
 Criminal Procedure (Amendment) Act, 1964.

K E N Y A

The Constitution (Amendment No. 3) Act, 1966.
 Public security (Detained and Restricted Persons) Reg. 1966.
 Emergency Regulations 1952.
 Emergency (Amendment No. 3) Regs. 1952.
 Native Lands Trust Ordinance (Cap. 100).
 Constitution of Republic of Kenya, 1966.

M A L A W I

Preservation of Public Security Act, 1964.
 Public Security Regulations, 1965.
 Preservation of Public Security Act 1960.
 Republic of Malawi Constitution 1966.

N I G E R I A

Magistrates Court Act 1963.
 Emergency Powers Act, 1961.
 Emergency Powers (Restriction Orders) Reg. 1962.
 Emergency Powers (General) Regs. 1962.
 The Constitution of the Federal Republic of Nigeria 1963.
 Nigeria (Independence) Constitution 1960.
 The State Security (Detention of Persons) Decree 1966.
 Suppression of Disorder Decree 1966.

T A N Z A N I A

Union of Tanganyika and Zanzibar Act 1964.
 United Republic (Declaration of Name) Act 1964.
 Preventive Detention Act, 1962.
 Penal Code (Cap. 16).

U G A N D A

Emergency Powers (Detention) Regs. 1966.

Emergency Powers (Requisitioning) Regs. 1963.

Emergency Powers Act, 1963.

Uganda (Independence) Order-in-Council 1963.

Constitution of Uganda, 1967.

Z A M B I A

Emergency Powers (General) Regulations 1964.

J O U R N A L S

African Digest.

Cmnd.814 (1959 The Report of the Davlin Commission of Inquiry into the State of Emergency in Nyasaland Cmnd.707 (1959)).

WP. No.10/59 of Ghana (Report of the Granville Shap Commission, Accra, 1959.

Report of the Commission of Inquiry into the Lumpa Disturbances (Lusaka, 1905)

Report of the Tribunal on Detainees (1907, Govern, Printers (Lusaka).

Cmnd. (1930) Vol.II - Report of the Joint Parliamentary Committee on Indian Constitutional Reform.

Cmnd. 1523. Constitutional Report (Uganda). Cmnd.1138 Report 1960.

Cmnd.1148. Parliamentary Papers 1959-60. XI The Advisory (Moncklon) Commission on the Review of the Constitution of Rhodesia and Nyasaland.

2. Bulletin of International Commission of Jurists.
3. Current Legal Problems.
4. Hansard.
5. Journal of International Commission of Jurists.
6. Journal of International Affairs.
7. London Gazette.
8. National Assembly Debates (Zambia)
9. New York Times.
10. New Statesman.
11. Malaya Bar Review.
12. Political Studies.
13. Public Law
14. Transition (Uganda Journal.)
15. The Lawyer. University of Lagos Publication.
16. The African and Colonial World.
17. The Guardian.
18. The Times (London).
19. West Africa.

BIBLIOGRAPHY

- ANDERSON, J. N. D. edited by
Changing Law in Developing Countries (London,
Allen & Unwin 1963).
- AWOLOWO, OBAFEMI
Awo: the autobiography of Chief Obafemi Awolowo
(O. U. P. 1960).
- BATTEN, T. R.
The Community and Development (1951 London).
- BLACK, Jnr.
The People and the Constitution (1960).
- BENNION, F. A. R.
The Constitutional Law of Ghana (London 1962).
- BENTHAM, JEREMY
Anarchical Fallacies: Works (Bowring) Vol. II.
- BUSIA, K. A.
Africa in Search of democracy (Routledge &
Regan Paul 1967)
- CARR, Sir CECIL
Concerning English Administrative Law (New York 1941)
Delegated Legislation (Cambridge 1921).
- CHATTERJEE, N.C. and RAO, P. P.
Emergency and Law (Asia Pub. Hs. London 1966).
- COLEY.
Constitutional Interpretation (8th Edn.)
- DELF, G.
Asians in East Africa (1963) O. U. P.)
- DENNING, Lord.
Freedom under the Law (London 1949).
- DICEY, A. V.
The Law of the Constitution (15th Edn. London)
- DIKE, K. O.
Trade and Politics 1830-1885 (Oxford 1956).
- ELIAS, T. O.
Nigeria: the development of its laws and constitution
(The British Commonwealth) (Stevens 1967).
Ghana & Sierra Leone: the development of their laws
and constitutions (British Commonwealth) (Stevens 1962).

- EZERA, KALU
Constitutional Developments in Nigeria (O.U.P)1960).
- FRANCK,
Comparative Constitutional Process: Cases and
Materials (London, Sweet & Maxwell, 1968).
- FRANKFURTER, Felix
Mr. Justice Holmes and the Supreme Court (Cambridge
Massachusetts 1938).
- GLEDHILL, Alan
The Problem of the Security of State and Liberty
(London 1958).
- GROVES, Harry E.
Comparative Constitutional Law - Cases and Materials
(Oceana Pub. Inc. 1963)
- HAILEY, Malcolm 1st Baron
An African Survey (London 1938)
- HAMSON, C. J.
Executive Discretion and Judicial Control (London 1954)
- HAYFORD, Casely
Gold Coast Native Institutions (London 1913)
- JENNINGS, Sir Ivor
The Approach to self-government (1956 Cambridge)
The British Constitution (Cambridge 1941)
- KEESING:
Keesing's Contemporary Archives
(Weekly diary of important world events)
- KENYATTA, Jomo
Kenya: The Land of Conflict (Government Printer,
Nairobi 1967)
- de SMITH
The New Commonwealth and its Constitutions (Stevens
1964)
- LUGARD, (Lord)
The Rise of our East Africa Empire (Edinburgh 1893)
The Dual Mandate in British Tropical Africa
(Edinburgh 1926)
- MCWHINNEY,
Judicial Review in English speaking world (Toronto,
1960).
- MACDERMOTT, (Lord)
Protection from Power under English Law (London 1957)

- MORRIS, Colin
A Humanist in Africa: Letters to Colin Morris by
Kenneth Kaunda.
- MURDOCK, G. P.
Africa, its Peoples and their Culture History
- NWABUEZE, O.
Constitutional Law of the Federal Republic of
Nigeria (London 1964).
- ODUMOSU, I. O.
The Nigerian Constitution (1963, Sweet & Maxwell)
- PADMORE, George
How Britain Rules Africa (Wisehart Books Ltd., 1936)
Africa: Britains Third Empire (Dobson London 1949)
- PARKHURST, R.
Kenya: A history of two Nations (Ind. Pub. 1954)
- PEASLEE, A. J.
The Constitutions of Nations. Africa.
- PHILLIPS, Hood
The Constitutional Law of Great Britain and the
Commonwealth (London 1957).
A history of the Criminal Law of England (London)
The Principles of English Law and the Constitution
(London 1939).
- PIKE, John G.
Malawi (Pall Mall Press 1968).
- RUBIN, Land Murray, P.
The Constitution and Government of Ghana (2nd Edn.)
(London, Sweet & Maxwell, 1964).
- SAMPSON, Magnus
Gold Coast Men of Affairs. (Dawson 1969)
- SCHWARTZ, B.
American Constitutional Law (1955 Cambridge)
Law and Executive in Britain (New York, 1949).
- ST. LUKE, Chapter XXIII
- SIEGHART, M. A.
Government by Decree (London 1950).

The Memoirs of Lord Chandos (1962).

WADE, H. W. R.
Administrative Law (1967 Oxford, Clarendon Press)

WADE, E.C.S. and PHILLIPS, G.G.
Constitutional Law (5th Edn. London).

WADE, H. R. W. (Edited by)
Annual Survey of Commonwealth Law.

WHEARE, K. C.
Federal Government (3rd Edn., London)
Modern Constitutions (O.U.P. 1960).

WISEMAN, H. V.
The Cabinet in the Commonwealth (London 1958)

YOUNG, Crawford.
"The Obote Revolution" in Africa Report (June 1966)
Vol. II.

- BAPTIST, F. A.
"Constitutional conflict in Nigeria: Aburi and After"
(July 1967) Vol.23. No. 7, 301.
- COLLIER, G. B. O.
"Human Rights in Sierra Leone" in (1965) 11 Howard
L. J. 500.
- DALBY, David.
"The Military Take-over in Sierra Leone"
World Today (August 1967) Vol. 23 No. 8, p. 354.
- DAVIES, S. G.
"Some recent decisions on the Nigerian Constitution"
(1962) 11 I.C.L.Q.
- de SMITH
"Fundamental Rights in the Commonwealth" in
10 International and Comparative Law Quarterly p. 84.
"Federation and Human Rights" in Federalism in the
New Nations of Africa (1964 edited by Currie).
- ELIAS, T. O.
"Report of Committee I, Committee on Human Rights and
Government Security" African Conference on the Rule of
Law - Lagos Law 1961.
- GHAI, Y. P.
"Matovu's Case - Another comment"
(1968) E. A. L. R. Vol.1 No. 1 68.
- GROVES, Harry.
"Emergency Powers", Journal of International Commission
of Jurists (1961) Vol. III p. 1.
- La Van Grove, D.
"The 'Sentinels' of Liberty? The Nigerian Judiciary
and fundamental rights (1963) 7 J.A.L. 152.
- HOLLAND, D. C.
"Emergency Legislation in the Commonwealth" in 13 C.L.P.
(1960).
"Personal liberty in the Commonwealth" 11 C.L.P. p.151
"Human Rights in Nigeria" (1962) 15 C.L.P. p. 159.
- KIMBLE, G. A. T.
Tropical Africa (Vol.II) Society and Polity.
(1960 20th Century Fund New York).
- KEAY, E. A.
"Legal and Constitutional changes in Nigeria under the
military government" in (1966) J. A. L. 92.
- KIRKMAN, W. P.
Unscrambling an Empire: A critique of British Colonial
Policy 1955-66 (Chatto and Windus, 1966).

La Van GROVE, D.

"The sentinels of liberty"? The Nigerian Judiciary and fundamental rights" (1963) 7 J.A.L. 152.

LEGUM, Colin

"Single party democracy"? in The World Today Vol. 21 (1965) 526.

MACKINTOSH

"Federalism in Nigeria" in (1962) 10 Political Studies p. 223.

McAUSLAN, J.P.W.B.

"Political Stability and Constitutional Innovation in Tanzania" The World Today Vol. 22 (1966) 535.

"Recent developments in Tanzania" The World Today Vol. 24 (1968)

MARSH,

Working Paper on the Rule of Law in a Free Society.

MINNATUR, J.

"Emergency Powers in the states of Southern Asia." Thesis 1959 Ph.D. Law).

MARTIN, R.

"In the matter of an Application by Michael Matovu" (1968) E. A. L. Review Vol. No. 1 61.

MORRIS.

"The Ugandan Constitution" (1966) J.A.L. 112.

NAISH

"Some Legal Aspects of the Emergency", in the Lawyer, (A University of Lagos Law Society Publication) April 1963, Vol. 1, No. 1, 1963.

O'BRIAN, J. L.

National Security and the Supremacy of the Civil Courts (London 1921).

SAWER, Geoffrey.

"Emergency Powers in Nigerian and Malayan Federalism" in Malaya Bar Review Vol. 6, No. 1, p. 83.

UCHE

"Changes in Ghana law since military take-over" (1966) J. A. L. 106.

WEISFELDER, Richard

"Power Struggle in Lesotho" in Africa Report Vol. 12 No. 1, p. 5.

WELCH, C. E.

"The Roots and Implications of Military Intervention" in Soldier and the State in Africa - a comparative analysis of military intervention and political changes.